REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT:

OPELOUSAS....SEPTEMBER, 1832.

BROUSSARD *vs.* SUDRIQUE.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

Where a purchaser of a tract of land, when sued for the price, alleges fraud and error of fact and law, in the contract of sale, by stating his sole motive in the purchase was to benefit the vendor, by enabling him to set up a good and legal title against a claim in warranty, on account of an eviction from the same land, and that the vendor knew at the time such purchase could not subserve his purpose, not being the land from which the eviction took place: under these pleadings parole evidence will be admitted, to prove the error and fraud alleged in avoidance of the contract.

This suit is brought to recover of the defendant one thousand five hundred dollars, the price of three arpens of land by forty deep, on the bayou Teche, sold by the plaintiff to Martin Sudrique. The sale is evidenced by public act, dated

WESTERN DIS. Sept. 1832.

BROUSSARD vs. SUDRIQUE.

October 18, 1824, and retains a special mortgage until complete payment of the price.

The defendant pleaded a general denial, and alleged the sale from Broussard to him was simulated and fraudulent, and his signature to the act of sale illegally and fraudulently obtained. That he was induced by the plaintiff to sign the act of sale for the three arpens of land, with the express understanding that it should be used in defence of a claim for damages, against the heir of Robicheau, the original vendor of three arpens of land lying in the vicinity of that now sold; the last vendee, Duhamel, having been evicted at the suit of Pierre Broussard, the plaintiff's father. The plaintiff represented the land recovered by his father as actually belonging to him, but that, from feelings of delicacy, he disliked to set up title in his own name against his father. Both plaintiff and defendant were married to heirs of Robecheau, and interested in defeating the claim against said heirs for damages in the aforesaid eviction. That said act was only to be used in defence of said suit for damages, and to be null and void for all other purposes.

He further alleged the plaintiff had no right to the land so sold, which was not the land recovered by his father from Duhamel, and of no use in defence of the claim against Robecheau's heirs for damages in the eviction, and that all this was well known to the plaintiff at the time he made these representations to the defendant, in consequence of which the latter was induced to sign the act, under an error of both fact and law; supposing the plaintiff had a title to it, and that it was the same land recovered from Duhamel, and might be available in defence of his father's claim for damages resulting from the eviction, and which fell upon the heirs of Robecheau.

He prays that the sale may be annulled, declared void, and that he be released from all stipulations therein, as made in error.

In an amended answer, the defendant averred no delivery had been made of the land; that it is the same recovered of Dr. Duhamel, is still in litigation, and that he is disturbed in

his title by suits; that he purchased with warranty against Pierre Broussard, which has failed, the plaintiff never having any title from said Pierre. He prays that the plaintiff be compelled to establish his title from said Pierre Broussard, and on failure, that the sale be cancelled, and he allowed two hundred dollars as damages for breach of the obligations, &c.

The plaintiff excepted to filing the amended answer, on the ground that it contained new issues, changed entirely the nature of the defence, and tended to delay the cause, &c.

In another amended answer it is alleged, that since the recovery of this land by Pierre Broussard, the decree has been annulled by a subsequent judgement; so that all the title claimed by the plaintiff is destroyed, and he is thereby liable to the defendant on his obligation in warranty, &c.

Parole testimony was offered by the defendant, "to prove that the land really intended to be purchased by him was the land formerly in dispute between Pierre Broussard and Dr. Duhamel, &c.; that when the plaintiff made the sale he represented to him that he had a title to the land; and that he, the defendant, made the purchase through error falling on the substance of the thing sold. The plaintiff objected to the parole evidence, as being against the tenor of the written title sued on. The court sustained the objection, and the defendant excepted. There was judgement for the plaintiff, and the defendant appealed.

Simon, for plaintiff:

1. Parole evidence is offered by the defendant, to prove matters beyond and contrary to the contents of a public act; to attain this object he alleged error. The evidence is inadmissible. *L. C.* 2256. *Pothier on Ob. nos.* 758–9.

2. The exception to the general rule is applicable only to allegations of fraud or violence, but not as to error. *Pothier on Ob. no.* 765. *Toullier, vol.* 9, *no.* 177.

WESTERN DIS. Sept. 1832.

BROUSSARD vs. SUDRIQUE.

3. The allegations of error, and the evidence offered, are clearly intended to show that the title to the land sold is not good, but disputed by other claimants. This cannot be shown, for the defendant has not been disturbed in his possession, and there is no adverse title set up to the land.

4. A vague plea of error cannot take this case out of the general rule, and admit parole evidence to destroy a public and written act.

Brownson, for defendant:

1. There is error in this case falling on the substance of the thing, which was the object of the contract; the land actually sold not being the same intended to be sold and purchased. Therefore the sale should be annulled.

2. Parole testimony is admissible to prove fraud or error. It is not denied that it is admissible to prove fraud. But if error be a sufficient cause to annul a contract, how can it be proven except by parole evidence? The title is the evidence of the contract; if, therefore, there be no mistake in that evidence, there can be no claim for relief. It is only when the contract, as made, happens not to be the one intended, that relief is required. In how few instances could the law operate, if only written evidence be admissible to prove error. It is scarcely possible to suppose a case where written evidence, without the aid of parole testimony, could establish it.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to recover the price of three arpens of land, fronting on the bayou Teche, with the depth of forty. The price stipulated to be paid, as appears by the contract of sale, is one thousand five hundred dollars, which was payable by instalments, &c. The act of sale is in authentic form, and its execution by the parties is not denied. But the defendant seeks to avoid the contract on the ground pleaded in his answer, viz: simulation, fraud, and error falling on the

substance of the thing bought, and in the motive which induced him to buy, which was well known to the seller (the plaintiff), at the time the contract was made.

The defendant offered written evidence and testimonial proof, to establish the allegations contained in his answer. Both were rejected by the court below as inadmissible, on account of their tendency to prove facts contrary to the written contract of sale; and judgement being rendered for the plaintiff, the defendant appealed.

The only question, arising in the present state of the cause, is that which grows out of the bill of exceptions, taken by the counsel for the appellant, to the opinion of the judge *a quo*, by which he rejected the testimony offered on the part of his client.

This question is really not without difficulties. On the side of the plaintiff we find an act of sale, made before a notary public in due form, in which the land sold is designated, the price fixed, and terms of payment established with precision. This solemn act the defendant claims to have annulled, on the ground of simulation, fraud and error. If either of these can be established by evidence legally admissible, the contract ought to be anulled, as wanting an essential requisite in all such agreements, *i. e.*, the consent of the parties.

As to the allegation of simulation, that fact, according to our laws and the decisions of this court, admits of no other proof between the parties to a contract, except by a counter letter or something equivalent thereto. But fraud and error are generally susceptible of proof in no other way than by witnesses; for it can never be presumed that men do reduce to writing, evidences of their frauds or errors, particularly when the latter are gross, and partake of fraud. In the present case, the allegations of fraud and error are so closely connected by the facts stated in the answer, that it is difficult to separate them, in relation to the proof by which they are to be established. The defendant states that the land described in the act of sale is not that which he intended to purchase; and that the motive which induced him to buy would not and

WESTERN DIS. Sept. 1832.

BROUSSARD vs. SUDRIQUE.

could not have influenced him to take any other land than that which he had in view at the time of the contract, and this to the advantage of the seller.

We find a distinction made in the Louisiana Code, on the subject of errors, between those that fall on the substance of the thing bought and those which relate to the motives of the parties in making the contract. The examples given of the former kind of errors, relate to cases where the form of the thing may be the same, but the substance differs. *L. Code, arts.* 1835—8.

In a case like the present, when error is alleged in the sale of a certain tract of land, designated by locality and contiguous lands, and the purchaser could show no motive which probably caused him to have in contemplation a different tract from that actually sold to him, and by him formally accepted in a written contract, perhaps he would not be authorized by law to prove facts by oral testimony contrary to those contained in the written contract, unless he could show the vendor knew at the time that he was deceiving such purchaser as to the very thing itself sold. Although there may be no difference in land, speaking in relation to the substance of the thing, yet when land is divided by a government into innumerable tracts, and owned by different individuals, and a purchaser intends to buy a certain tract from an owner of several, and the latter sells to him one altogether distinct from that which he intended to buy, such a contract would certainly want the consent of one of the parties in relation to the entire thing, both as to substance and incidents, form, and every thing else. But whether such error, without fraud on the part of a seller, could be established in favor of the buyer by testimonial proof, need not be settled in the case now under consideration.

Where a purchaser of a tract of land, when sued for the price, alleges fraud and error of fact and law, in the contract of sale, by stating his sole motive in the purchase was to benefit the vendor, by enabling him

The defendant alleges and offered to prove, that he bought the land offered for sale by the plaintiff, with the sole view and motive to enable him to give a good and legal title to persons who were pursuing him in warranty, or about to commence such pursuit, on the ground of eviction from this land intended to be bought, caused by the father of the plaintiff, a

purchaser from the ancestor of the defendant's wife; and that this, the sole motive of the purchaser, was known to the vendor at the time; and, moreover, it is alleged on the part of the defendant, that the land actually bought did not and could not subserve the purposes for which alone the purchase was made; not being that from which the eviction took place.

Under these pleadings, we think the court below erred in rejecting the evidence and witnesses offered. *L. Code*, 1818, *et sequentes*.

In the case of *Berard's heirs* vs. *Berard*, the testimony to prove the error alleged, was admitted without objection or exception. That case has, therefore, no strong bearing on the present.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be avoided, reversed, and annulled; and it is further ordered, adjudged, and decreed, that the cause be remanded to said court, to be tried *de novo*, with instructions to the judge *a quo* to admit written or testimonial proof of the fraud and error alleged by the defendant in his answer. The appellee to pay the costs of this appeal.

to set up a good and legal title against a claim in warranty, on account of an eviction from the same land; and that the vendor knew, at the time, that such purchase could not subserve his purpose, not being the land from which the eviction took place; under these pleadings, parole evidence will be admitted to prove the error and fraud alleged in avoidance of the contract.

DE L'HOMME *vs.* DE KERLEGAND.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING

Two inconsistent demands, such as certain specified property and a note given for the price of that property, cannot be cumulated in the same petition or action; the one excludes the other.

In such a case the defendant may refuse to plead until the plaintiff selects which one of the two demands he intends to proceed with; but omitting to do so and joining issue, does not deprive the defendant of his right to object to the cumulation of two inconsistent demands at any subsequent stage of the proceedings.

WESTERN DIS. Sept. 1832.

DE L'HOMME vs. DE KERLEGAND

It is a general rule that objections to the form of actions must be made *in limine litis*, and are waived by a joinder in issue; but when they affect the substance or merits, they cannot be cured by this course of pleading.

But at whatever stage of the proceeding the objection is taken, the plaintiff has a right to select which demand he will pursue.

The plaintiff alleges he is the curator of Louis De l'Homme (who is absent or dead), and as such, claims of the defendant two tracts of land, a negro woman and her two children, and eighty head of horses and horned cattle; and also, three thousand dollars due by a note, and payable to Louis De l'Homme, signed by the defendant and dated June 8, 1827. The defendant alleged he purchased all the property claimed by the plaintiff from Louis De l'Homme, who conveyed it to him by an act *sous seing privé* executed in duplicate the eighth June, 1827, and proved by two witnesses before the parish judge; that this note for three thousand dollars had been paid, the debt remitted to him, and the note torn to pieces by the consent of D l'Homme and thrown away, but had been picked up and pasted together by some person unknown to him, and now sued on. He also stated that Louis De l'Homme had no legitimate or legal heirs and owed no debts; and denied the plaintiff's right to represent him as curator of an absentee, he being dead before the appointment.

The plaintiff, in amended petition, denied the validity of the act of sale set up by the defendant, and that it was obtained by fraud, no consideration having been given on the part of the defendant. The latter denied the plaintiff's right to dispute the validity of the act of sale; not being forced heirs, creditors, or for the use of either of them, proof of the alleged fraud cannot be offered.

A set of persons styling themselves heirs of Louis De l'Homme now intervened. They alleged that the act of sale made by Louis De l'Homme to the defendant, was for the benefit of Madame De Kerlegand his mother, as an indirect and disguised donation, he being a person interposed; that

the mother of defendant lived in a state of concubinage and adultery with Louis De l'Homme, and is incapable in law to receive a donation, &c., which made directly to the concubine, or indirectly through an interposed person, is void in law and of no effect against the donor. They prayed to join the plaintiff, interplead, and be put in possession of the property; that the defendant be prohibited from setting up any title to it under the said act or otherwise.

The defendant's counsel objected to filing the petition of intervention, on the ground that the persons styling themselves as heirs and plaintiffs in intervention, had no interest in the event of the suit, their rights could not be compromitted, and that it would change the issues joined between the original parties, &c. The objection was overruled.

The defendant offered the act under private signature from Louis De l'Homme to the defendant, as evidence to prove the sale, and witnesses to prove the execution of the instrument, all of which was objected to on the ground that the act was not signed, De l'Homme having made his mark, which is not a signature; and that calling witnesses to prove the making of the mark, would be receiving parole evidence of a contract required to be in writing. That the *marque ordinaire* is not a signature in contemplation of law; and an act *sous seing privé*, signed by making the *marque ordinaire* cannot be received as a commencement of proof in writing. The objection was overruled, and excepted to by plaintiff's counsel.

The plaintiffs offered parole evidence to prove the fraud and simulation of the sale to the defendant for the purpose of disguising a donation to his mother who was incapable of receiving, &c. The defendant's counsel objected to its admission, on the ground that the mother was no party on record; that the vendor himself could not attack the act of sale, and that the evidence goes to contradict a written ti
and is inconsistent with the plaintiff's own demand
the amount of the note sued on. The obj
tained and excepted to. The defend
jected to questions being asked by

WESTERN DIS. Sept. 1832.

DE L'HOMME vs. DE KERLEGAND

under cross examination, concerning the title to the property claimed, or what De l'Homme should have said about the disposition of it. The objection was sustained by the court, and the opinion excepted to.

Parole evidence was received, proving the note sued on to have been given for the price of the property claimed in the same suit; also, establishing the heirship of the intervenors, and the execution of the act of sale to defendant. It was likewise proved that defendant had paid one hundred and twenty-five dollars on the note, and that Louis De l'Homme when about quitting the country surrendered the note to defendant, when it was torn to pieces and thrown on the ground. It was not shown by whom it was picked up and preserved.

There was a verdict for the defendant that he be quieted in possession of the property and discharged from the payment of the note, but accorded twenty cents damages to the plaintiff. The plaintiffs appealed.

Simon and *Gayoso*, for plaintiffs:

1. The act under private signature offered by the defendant as the basis of his title to the property held by him, is invalid in law and inadmissible as proof. An act under private signature must be signed by the parties thereto. *Lou. Code*, 2238, 2240. *Code of Practice, arts.* 324–5.

2. An act which is informal as a notarial act, will be good as a private writing if it be signed by the parties. But if it be not signed, but only subscribed by the party making his *marque ordinaire*, it will not serve even as a beginning of proof in writing. *Lou. Code*, 2232. *Pothier on Ob. vol.* 2, *no.* 774.

3. The Code provides that when a man does not know how to sign, the notary causes him to affix his mark to the instru- [illegible]. For how can a man formally avow or disavow his [illegible] if he has only made his mark, which any other man [illegible] *Code*, 2231, 2240. *Code of Prac.* 324, 325. [illegible] a party who is unable to write, has [illegible] instead of his signature, cannot

be considered an instrument of writing. *Sirey, Recusal des lois et des arrets, vol.* 7, *part* 2, *p.* 249, 670. *Ib. vol.* 8, *part* 2, *p.* 284. *Ib. vol.* 10, *part* 2, *p.* 268. *Ib. vol.* 12, *part* 2, *p.* 289. *Ib. vol.* 24. *part* 1, *p.* 245.

5. The proof of an instrument to which a party has affixed his *marque*, depends on the memory of witnesses; and, therefore, it is proving the act itself by witnesses; and this cannot be permitted when the instrument is an act of alienation of real property; it must be by written act. *Lou. Code*, 2255.

6. A concubine is incapable of receiving by donation, either *inter vivos* or *mortis causa*. The act of sale in this case is attacked as being a disguised donation to the concubine, through her son, who is by law presumed to be a person interposed. We offer evidence of these facts, which has been rejected, but which should have been admitted. *Lou. Code*, 1478. *Nap. Code*, 911. *Pand. Francaise, vol.* 8, *p.* 290–1.

Brownson, for defendant:

1. The mark of De l'Homme is a signature within the meaning of our code. Although the article may have been adopted from the French code, it must be interpreted in reference to our customs and manners. Our code is enacted in English as well as in French, and it cannot be said to have been the intention of those who adopted it in English to give to the expressions used, the strict and artificial meaning contended for. He cited *Bailey's Dictionary*, definition of the word "to sign." *Webster's Dictionary*, definitions of "sign," "signature," &c. 6 *Martin, N. S.* 400.

2. The plaintiffs have instituted this suit for the purpose of recovering the property claimed by them, from the son and not from the mother. The transfer to him is not a donation, but a sale. It is true he may be considered as a person interposed; but then the suit should have been brought against the mother. The son is not incapable of purchasing. It is only when the purchase is a disguise to cover a donation to the mother, that it becomes void. If such was the intention,

WESTERN DIS. Sept. 1832.

DE L'HOMME vs. DE KERLEGAND.

here the mother should have been sued so as to have given an opportunity to defend her rights.

PORTER, J., delivered the opinion of the court.

This action commenced by a petition filed in the name of Valcour De l'Homme, in which he styles himself curator of Louis De l'Homme, formerly of the parish of St. Martin.

In this quality, the petitioner claims from the defendant certain lands, slaves and cattle, which it is alleged he took possession of after the departure of Lewis De l'Homme, and which he refuses to give up.

He also claims payment of a note of the defendant, executed in favor of the absentee for three thousand dollars; and finally, two thousand dollars, the damages alleged to be sustained in consequence of the illegal detention of the property.

The answer sets up title to the property claimed in the defendant, by virtue of an act *sous seing privé*, deposited in the office of the parish judge of St. Martin, for safe keeping.

It admits the execution of the note set out in the petition, but alleges it was paid and surrendered by the payee to the defendant, who tore it up; and that afterwards, some person collected such of the pieces as could be found, and pasted them together, for the purpose of laying a foundation for the present suit.

It also alleges, that the debt evidenced by the notes, was after the same had been contracted, voluntarily remitted by the payee to the defendant; and, finally, it avers that Louis De l'Homme is now deceased, leaving neither legitimate ascendants nor descendants, nor debts due from his succession; that the plaintiff received his appointment after the decease of the person alleged to be absent, and is consequently without authority to represent him.

Upon this answer being filed, the plaintiff presented a supplemental petition, in which he denied the defendant had any such conveyance from Louis De l'Homme, as that relied on

by him in his answer; and, further averred, that if any such were in his possession, it had been obtained by fraud on the part of the defendant.

To this allegation the defendant answered, denying the fraud, and averring that as this suit was not brought for the use of the forced heirs of the deceased, nor for the use of his creditors, it was not competent for the plaintiff to question the validity of the act, nor to offer proof of the several frauds by him alleged.

The cause being thus at issue, several persons, among whom was the plaintiff in this suit, prayed leave to intervene, and be made parties. In the petition, they style themselves heirs of Louis De l'Homme, whom they aver to be dead. They adopt the allegations contained in the petition as theirs, and pray for judgment in their favor on the facts therein alleged.

They further state, that if it be true, as by the defendant alleged, that he has a sale from Louis De l'Homme, the same is null and void, being made to the defendant for the benefit of his mother, as an indirect and disguised donation, who for a long time previous to the death of the donor, lived with him in open concubinage and adultery.

The defendant objected to the right of these parties to intervene. The grounds of objection stated in the bill of exceptions are, that the interpleaders had no interest in the event of the suit; that their rights could, under no circumstances, be compromitted by it; that the petition of intervention would make an entire change in the issues joined between the original parties. The judge overruled the objections, and permitted the claim in intervention to be filed, upon which, the defendant took a bill of exceptions.

As the defendant is appellee in this court, and has not prayed the judgement below should in this respect be amended, it is unnecessary to decide the question which this bill of exceptions presents.

On the trial, the defendant offered in evidence a writing, to which the deceased had affixed his mark in the presence of witnesses. The plaintiffs objected to the introduction of the

instrument, on the ground that the property conveyed by it, could only pass by a writing *signed* by the parties, and that a mark was not a signature in the intention of the law. The court overruled the objection, and permitted witnesses to prove the execution of the act. The plaintiffs excepted to this decision, and the principle of law involved in it, has been well and elaborately discussed; it is one, however, which the rights of the parties now before us, does not require us to pronounce an opinion on.

Two inconsistent demands, such as certain specified property, and note given for the *price* of that property, cannot be cumulated in the same petition or action; the one excludes the other.

This suit, as has been already stated, is brought to recover certain property, and at the same time, enforce the payment of a note due by the defendant to the deceased. It appears very clearly in evidence, this note was given in payment of the property sued for; and it is equally clear, that two such demands cannot be cumulated in the same petition; they are inconsistent, and by an express provision of our law, the one excludes the other. *Code of Prac., Art.* 149.

In such a case, the defendant may refuse to plead, until the plaintiff selects which one of the two demands he intends to proceed with; but omitting to do so, and joining issue, does not deprive the defendant of his right to object to the cumulation of two inconsistent demands at any subsequent stage of the proceedings.

The defendant might have refused to plead to the merits, until the plaintiffs made choice as to which of the two demands they intended to proceed with; he, however, chose to join issue on the allegations in the petition. But on evidence being offered by the plaintiffs to prove the illegality and fraud of the sale, he objected to its introduction on several grounds, and one of which was, that the claim, to show the illegality of the sale, was inconsistent with the demand for payment of the consideration of that sale.

It is a general rule, that objections to the *form* of action, must be made *in limine lites*,

Of that opinion was the court below. In examining its correctness, the first question is, whether the failure of the defendant to object *in limine lites* to the cumulations of the two actions, deprived him of the right to do so in a subsequent stage of the proceedings. It is a general rule, that objections to form are waived by a joinder in issue on the merits; but in this instance, the defect was one which could not be cured by this course of pleading, it being one of substance; the law having said the one action precludes the other, it follows as a consequence, that judgement could not be rendered on both, and therefore one or the other must be

abandoned, before judgement could be pronounced. But at whatever stage of the cause the objection is taken by the defendant, we think the plaintiff has a right to select which he will prosecute; in this case, the appellants, had they thought fit, might have chosen to contest the validity of the sale alone, and have brought the case upon the ground of the refusal to permit them to give in evidence to prove their allegations. But instead of doing this, they proceeded to put their case to the jury on the right to receive the amount of the note. Having done so, they cannot now have the cause sent back to be tried on a demand, which is contrary to, and precludes that on which judgement was rendered. *Adams* vs. *Lewis*, 7 *Mar. N. S.* 400.

and are received by a joinder in issue; but when they affect the substance or merits, they cannot be cured by this course of pleading.

But at whatever stage of the proceeding the objection is taken, the plaintiff has a right to select which demand he will pursue.

This opinion renders it unnecessary to examine the validity of the instrument of writing under which the defendant claims the property, or to decide on the several bills of exceptions taken to the opinion of the court in regard to testimony offered, to shew the sale was fraudulent and without condition. The demand and judgement on the note covers, and cures all these defects.

The jury found that the note was given to the payee in consideration of the sale, and that it was surrendered by him to the defendant, without any part of it being paid, except the sum of one hundred and twenty-five dollars; and that twenty cents damages be accorded to the plaintiffs. The court gave judgment in pursuance to this verdict. On looking into the record, we perceive the evidence fully justifies the conclusion to which the jury came in relation to the note. It was surrendered to the defendant, and this act on the part of the payee, extinguished the obligation. If the intention of the deceased was to make a donation to the defendant, the plaintiffs who are neither forced heirs nor creditors, have no right to complain of it. *La. Code*, 2126, 2195, 1480–3.

But we cannot divine on what ground the jury gave damages in favor of the plaintiffs, and at the same time found a verdict, by which the defendant was entitled to

judgement on the merits. One or the other must be wrong, and as we think the first was, the judgement must, in this respect, be corrected as the appellee has prayed.

It is, therefore, ordered, adjudged, and decreed, that the verdict and judgement rendered in this case, be avoided, annulled, and reversed; and it is further ordered, adjudged, and decreed, that there be judgement for the defendant, with costs in both courts.

MELANCON'S HEIRS *vs.* DUHAMEL ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT.

In a suit for the price of a tract of land, where the defendant set up the judgement of a third party, evicting him of the land, and praying for the rescission of the sale and cancelment of his obligation to pay the price, the plaintiff may amend his petition, and allege facts in avoidance of the causes of rescission and nullity of the sale set forth by the defendant.

The records of the suit evicting the defendant, and the act of renunciation of the party evicting him, renouncing all advantage under such judgement, are admissible evidence on the part of the plaintiff, to show the eviction was procured through fraud and collusion on the part of the defendant; and that all advantage gained by it was renounced.

This suit was commenced for the recovery of three thousand and eighty-five dollars, due by Jean Duhamel and J. Latislais, his surety, as the last instalment of the price of five arpens of land, by 40 on the Teche, purchased at the sale of Melançon's estate. The defendant, Duhamel, alleged that he was disturbed in the possession by Pierre Broussard, who

had commenced a suit against him for the same land, and refused payment. Broussard obtained final judgement of eviction and recovery of three and a half arpents of this land against Duhamel. See case, 3 *Martin, N. S.* 7.

Duhamel set up this judgement in eviction against the plaintiffs demand, and prayed for the rescission of the sale, the cancelment of his notes, and for damages, &c.

The plaintiffs in an amended petition, allege that the first instalment has not been paid, for which a judgement was rendered and confirmed by the supreme court. They set up the fraud and collusion between Duhamel and Pierre Broussard, in obtaining the judgement of eviction, (See 2 *La. Rep.* 8,) and pray for judgment for the whole amount of the price, and that the land be sold to satisfy it. They also offer an act, by which P. Broussard renounced to Melançon's heirs, all the advantage under his judgment against Duhamel. The defendants deny that the plaintiffs have secured them in their title to the land, either by the renunciation of Pierre Broussard or otherwise, and that they are not liable. J. Latiola, one of the defendants, says he is discharged from his liability as surety of Duhamel; as by the acts and failure of the plaintiffs to make a good title to the land, he cannot be subrogated to their rights and privileges, &c.

The plaintiffs' counsel offered in evidence two records of suits between Melançon's heirs and P. Broussard; the first an action of nullity to annul the judgement Broussard had obtained against J. Duhamel; and, also, the act of renunciation of P. Broussard, of all advantages he might derive from his judgement against Duhamel. The defendant objected to them as evidence, and the court sustained the objection. The plaintiff took his bill of exceptions.

The district judge being of opinion the eviction pleaded by the defendants was fully proven, that the sale ought to be rescinded, and they discharged from further liability, gave judgement accordingly. The plaintiff appealed.

MATHEWS, J., delivered the opinion of the court.

WESTERN DIS. *Sept.* 1832.

MELANCON'S HEIRS *vs.* DUHAMEL ET AL.

The plaintiff brought suit against the defendant and his surety, Latiolais, in the year 1822, to recover the second instalment of the price of a tract of land which had been adjudicated to the defendant at a probate sale of the succession of Charles Melançon, the ancestor of the plaintiffs. The whole price of adjudication was six thousand one hundred and seventy dollars; and the plaintiffs allege in an amendment to their petition, that they had previously obtained judgement for the first instalment, which still remained unsatisfied or paid. The recovery of the sum adjudged was prevented by injunctions to the proceedings of the plaintiffs, obtained at various times and on different grounds by Duhamel.

The defendants in the present case, deny the right of the plaintiffs to recover any part of the money claimed, and pray judgement that the sale of the property by the adjudication above stated, should be cancelled and annulled for causes stated in their answer.

In a suit for the price of a tract of land, where the defendant set up the judgement of a third party, evicting him of the land, and praying for the rescission of the sale and cancelment of his obligation to pay the price, the plaintiff may amend his petition, and allege facts in avoidance of the causes of rescission and nullity of the sale set forth by the defendant.

The amended petition alleges facts in avoidance of the causes of nullity relied on by the defendants. It was by them opposed, and an exception taken to the opinion of the judge *a quo*, by whom it was admitted. We are of opinion that the judge did not err in allowing the amendment; it seems to us to have been necessary, in proceeding to an investigation of the claims and rights of the parties litigant. Under the petition as amended, the plaintiffs offered the records of previous suits between the present parties, and also of one brought by Pierre Broussard against Duhamel, in which the former recovered part of the tract of land (which had been adjudicated as above stated) from the latter. All these records were rejected by the court below, and all other evidence offered on the part of the plaintiffs, and judgement was rendered in favor of the defendants, it was ordered that the sale from Melançon's heirs should be cancelled, &c. From this judgement, the plaintiffs appealed.

As the case is situated before this court, it requires examination only in relation to the appellant's bill of exceptions. Whether the facts contained in those records are conclusive

The records of the suit, evicting the defendant, and the act of renunciation of the party evicting him, renouncing all advantage under such judgement, are admissible evidence on the part of the plaintiff, to shew the eviction was procured through fraud and collusion on the part of the defendant, and that all advantage gained by it, was renounced.

or not on the rights of the parties, we are of opinion that they ought to have been admitted in evidence. They contain a history of the proceedings, in which both the parties to this suit seem to have been interested, either directly or indirectly, and were certainly properly admissible to prove what had been done in those proceedings; and although they may not have any conclusive legal effect on the present pretensions of these parties, they may be necessary to a proper understanding of the evidence which appears by the bill of exceptions to have been offered and rejected. What this other evidence was, is not clearly shewn by the record; but the counsel on both sides regard it, as if part of it was a renunciation of P. Broussard to the rights which he had acquired under the judgement by which he recovered the land from Duhamel. This instrument is alleged to have been made under private signature; but, on proper proof of its execution, was admissible according to the pleadings of the case. What effect it may legally have on the rights of the parties, is quite a different question from that of its admissibility in evidence; and the questions as to the records offered, stand in the same situation.

We are of opinion that the judge *a quo*, erred in rejecting the evidence offered on the part of the plaintiffs.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be avoided, reversed, and annulled; and that the cause be remanded to the said court for a new trial, with instructions to admit the evidence offered, that is to say, the records and the act of renunciation (or by whatever name it may be properly called) by which P. Broussard is alleged to have renounced in favor of Duhamel and Melançon's heirs, the rights which he acquired under the judgement rendered in his favor for a tract of land, which was in controversy between him and the parties to the present suit; the appellees to pay the costs of this appeal.

Brownson, for the plaintiffs. *Simon*, for defendants.

APPEAL FROM THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

A defendant who has recovered judgement over against his warrantors, on the case being remanded to assess the damages against the latter, he may dismiss his suit; as he then assumes the situation of plaintiff.

This suit was first instituted for the recovery of three and one-half arpens of land with the depth of forty, on the bayou Teche. The defendant Duhamel cited the heirs of Melançon, his vendors in warranty; they appeared, the cause was tried and went up to the Supreme Court, and at September term, 1824, a final judgement was rendered in favor of the plaintiff for the land, and remanded for the assessment of damages against the warrantors. See 3 *Martin, N. S.* 7.

On the return of the case to the District Court, it was stayed by order of court until another suit instituted by *Melançon's heirs* vs. *P. Broussard*, and then pending, to annul and set aside this judgement rendered by the Supreme Court, on the ground that it had been obtained through fraud and collusion between the plaintiff and defendant in the first instance, should be first tried. See case, 2 *Lou. Rep.* 8.

After the final decision of the last mentioned suit, this cause came on at the October term, 1830, for the assessment of damages against the warrantors. The curator of the vacant succession of Jean Duhamel, then deceased, obtained leave to file an amended answer, declining to exercise his recourse in damages; and disclaimed all damages resulting from the warranty. Melançon's heirs replied that Duhamel, in his lifetime, had through fraud and collusion procured this suit to be instituted against him to rescind the sale from the warrantors to him, and avoid payment of the price of the land. The warrantors now set up the fraud and collusion which they had alleged in their suit for the annulment of the judgement of eviction of Duhamel; and tender to his representative

the renunciation of Pierre Broussard, of all the benefits and advantages he had obtained in the Supreme Court by his judgement of eviction; and pray to be dismissed with their costs.

On the trial, Duhamel's counsel moved to dismiss his claim for damages, to which the counsel for Melançon's heirs assented, provided the claim of Duhamel to have the sale of the land rescinded be also dismissed. This proposition was declined. The claim for damages being waived, the district judge was of opinion there was nothing left for the court to proceed on; gave judgement of dismissal accordingly.

The warrantors wishing to have the question of fraud and collusion which produced the eviction and rescission of the sale, tried, appealed.

MATHEWS, J., delivered the opinion of the court.

The plaintiff having recovered from the defendant a certain tract of land, which the latter had purchased at a probate sale of the succession of Charles Melançon, and his heirs being cited in warranty in this suit, the cause was remanded to have the damages assessed as between the defendant and his warrantors. Previous to proceedings in the cases between the defendant and the persons cited in warranty he died, and the action was prosecuted by the curator of his succession, who prayed leave to dismiss the suit in relation to the prayer for damages, which was granted by the court below, and an order to dismiss was accordingly made, from which the warrantors appealed.

A defendant who has recovered judgement over against his warrantors, on the case being remanded to assess the damages against the latter, he may dismiss his suit, as he then assumes the situation of plaintiff.

We are unable to perceive any reason why the curator of Duhamel's estate should not have been allowed to dismiss a suit in which he had assumed the situation of plaintiff. In what manner a proceeding of this kind could operate against the interests of the defendant does not appear.

It is, therefore, ordered, adjudged and decreed, that the judgement of the District Court be affirmed, with costs.

Simon, for plaintiff.

Brownson, for the defendants called in warranty.

DELAHOUSSAYE *vs.* DUMARTRAIL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

The sale and alienation of minors' property, although made by notarial act, even when the minor is assisted by his curator, is absolutely void if made without the order of the judge.

So the sale and alienation of a tract of land, under mortgage in favor of a minor, even where the minor is assisted by his curator and by notarial act renounces his right of mortgage, is null and void, and such minor when he comes of age, may annul and set the sale aside and subject the property to his legal mortgage.

This is an hypothecary action against mortgaged property in the hands of the defendant as third possessor. The plaintiff had a judgement against one Balthazar Delahoussaye in the probate court for the parish of St. Martin, for two thousand five hundred and sixty-four dollars, with interest; which recognised a general mortgage on all the estate of debtor which he possessed since the 14th of October, 1814. The defendant is in possession of a tract of land, purchased from B. Delahoussaye and subject to the plaintiff's mortgage, and which the latter is bound to pursue under an order, and plea of discussion in another case, before he can have recourse to any other of the mortgaged property of B. Delahoussaye.

The defendant states that he purchased the land in question at a sale under execution against B. Delahoussaye, in June, 1822, and in March, 1823, he exchanged it with Luffroy Provost for another tract of the same size adjoining it, and which was also purchased from B. Delahoussaye. He avers that the plaintiff, then a minor, came forward by his curator and renounced in favor of the defendant and L. Provost, all his privileges and mortgages to the same, and ratified the sales, &c.; and he cannot now protect himself, by a plea of minority, against the effect of the act of renunciation, because

more than four years has elapsed since he arrived at the age of majority before bringing this suit, or before suing his curator, and since he gave his curator a discharge, &c. He pleads the prescription of four and five years, and cites L. Provost, his vendor, in warranty.

The plaintiff amended his petition so as to include Provost in the same allegations and demand.

L. Provost, in his answer, relied on prescription as set out in defendant's answer, against the claim to the tract he exchanged to defendant; and for the other, he called upon Dumartrait in warranty to defend him.

There was judgement for the defendant. The plaintiff appealed.

Brownson, for plaintiff.

Simon, for the defendant:

1. We show that by an act passed the 24th of March, 1823, the plaintiff renounced in favor of the defendant, &c. all mortgages and privileges on the property now claimed, and fully approved the sale from B. Delahoussaye to the defendant. Although the plaintiff was a minor at that time, he is now barred by prescription from setting up any cause of action against the act, as more than four or five years have elapsed since he came of age, and the inception of this suit. *Lou. Code*, 356.

2. Minors are relievable against simple lesion in every species of contract. What is called here simple lesion is different from the lesion beyond moiety; it is always presumed in contracts made by minors, and it is not necessary when an action of nullity is brought by minors against an act of theirs, to allege lesion; proof of minority is sufficient. *L. Code, arts.* 1858, 1860.

3. The plaintiff in this case was entitled to his action of nullity against the renunciation contained in the act of the 24th of March, 1824, and ought to have brought it. Not having done so, he cannot succeed in this form.

4. In contracts made by minors, when all the forms of the law have been pursued, simple lesion must be alleged and proven. *L. Code*, 1861.

5. These actions are limited to four years, to date from the time the minor arrives at the age of majority. *L. Code*, 1870.

6. There is another provision of the code on which I rely to support the prescription of five years. It says "the action of nullity or rescission of contracts, testaments, or other acts, is prescribed by five years, and this prescription only commences against minors after their majority." *L. Code*, 3507.

7. Under the laws which governed before the adoption of the Louisiana Code, the minor had only four years after coming of age, to bring his action of nullity or restitution against all contracts made to his prejudice, either by himself or his guardian. (*Partidas*) *Moreau and Carlton*, 2 *vol.* 1157; *law* 8, *p.* 1153–4. 3 *Mar.* 456.

MARTIN, J., delivered the opinion of the court.

The plaintiff is appellant from a judgement by which the defendant's plea of prescription was sustained.

The object of the suit was to render a tract of land in the possession of the defendant liable to the plaintiff's claim on his curator, whose property the land was, theretofore. The defendant pleaded that the plaintiff had by a notarial act, in which he was assisted by his curator, renounced his right of mortgage on the premises; and although he, the plaintiff, was then a minor, he could not now seek relief against such an act on the score of nullity or lesion, as more than four years had elapsed between his coming of age and the date of the renunciation.

The sale and alienation of minors' property, although made by notarial act, even when the minor is assisted by his curator, is absolutely void, if made without the order of the judge.

The contract under consideration is one for the alienation of minors' real rights. Such rights he cannot alienate without the authority of the judge. The alienation before us is a gratuitous one which no court could sanction. The obtention of such an authority is an essential formality the absence of which renders the alienation absolutely void. And the Civil

So the sale and alienation of a tract of land, under mortgage in favor of a minor, even where the minor is assisted

Code provides that the contract of a minor, even assisted by his curator, if unaccompanied with the formalities required by law, is void, and the party may obtain the rescission of it by an action of nullity, or be relieved against it on his exception: "*quid temporalis sont ad potentum perpetua sont ad excipiendum.*"

The plea of prescription was improperly allowed.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be annulled, avoided, and reversed, the plea of prescription overruled, and the case remanded for further proceedings; the appellee paying costs in this court.

by his curator, and by notarial act renounces his right of mortgage, is null and void, and such minor when he comes of age, may annul and set the sale aside and subject the property to his legal mortgage.

DELAHOUSSAYE *vs.* DELACROIX.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

Where a mortgaged creditor pursues mortgaged property in the hands of a third possessor, he cannot pursue another portion of the property subject to the same mortgage in the possession of another purchaser, while he insists on his right to have the property in the hands of the first purchaser sold, or until it is discussed.

This is an hypothecary action against mortgaged property in the hands of the defendant, as third possessor. The plaintiff obtained a judgement against one Balthazar Delahoussaye, in the Probate Court of St. Martin, for two thousand five hundred and sixty-four dollars and interest; and which recognised a general mortgage on all the property of the debtor from October, 1814, until it was discharged. The defendant is in possession of a mulatto boy named Louis, sold as the property of B. Delahoussaye in March, 1823, and which is the object of the present suit. The plaintiff claims the boy Louis, as being subject to his mortgage.

WESTERN DIS. Sept. 1832.

DELAHOUSSAYE vs. DELACROIX.

The defendant cited A. D. Bienvenu in warranty, from whom he says he bought the slave in March, 1823. A. D. Bienvenu answers, that he bid off the slave at a sale under execution against B. Delahoussaye, at the request of Terence Delahoussaye, a brother, and who sold him to the defendant. He pleads discussion, and avers there is a tract of land, formerly belonging to B. Delahoussaye, and now in the possession of A. Dumartrail, subject to the plaintiff's mortgage, and which was last sold.

The court ordered the discussion to proceed accordingly, and all proceedings in this case, to be suspended in the meantime.

The plea of discussion having failed against Dumartrail, by the plaintiff's claim being barred by prescription, the warrantor in this case (A. D. Bienvenu) contends that the prescription was acquired by the negligence of the plaintiff to bring his action within four years after coming of age, to set aside the alienation of the land to Dumartrail, made by his curator.

There was judgement for the plaintiff, ordering the negro boy to be seized and sold to satisfy plaintiff's claim. Defendant appealed.

Brownson, for the plaintiff.

Simon, for the defendant:

1. We contend (supposing the judgement against Dumartrait to be affirmed) that the plaintiff having, by his own act, through his fault and by his negligence, put himself in such a situation, as to be unable to comply with the order of the court ordering the discussion, the loss ought to fall on him alone; and that as the defendant cannot now be subrogated to his rights, privileges, and mortgages on the property in possession of Dumartrait, the value of said property must be deducted from the amount of the claim for whom this suit is brought. This is the effect of the exception *cedendarum actionem.*

2. The third possessor is entitled to be subrogated to the plaintiff's rights. *Pothier Hypotheques, vol.* 1, *p.* 38–9, § 6.

3. When the third possessor, who has paid the creditor, and the possessors of the other property subject to the same mortgage, have acquired them from the same vendor, there is a distinction to be made, if the third who is sued, has acquired his property since the sale to the other possessors, he cannot be subrogated, &c. But if the third possessor who is sued, has his sale anterior to the others, he is then entitled to his hypothecary action against them, &c.

4. If the creditor from whatever cause, has put himself in a situation to render it impossible to cede his rights to the third possessor, the exception *cedendarum actiorem* takes place, and the creditor must suffer the loss of the value of the property, to which he cannot cede his rights. *Pothier Hyp. vol.* 1, *p.* 39–40. *Ibid, vol.* 2, *p.* 23. *no.* 43. *Jurisprudence Hyp. par Guichard, vol.* 1, *p.* 392, *no.* 1. *Ibid, vol.* 2, *p.* 300, *no.* 3.

5. The loss the plaintiff should suffer is the value of the tract of land in the possession of Dumartrait. We admit, that if it does not amount to the plaintiff's claim, the property in the possession of the defendant, is liable for the balance. *Sirey, vol.* 15, *part* 1, *p.* 258. See *Sirey's Dig., p,* 28. *Word Hypothecaire, no.* 2.

MARTIN J., delivered the opinion of the court.

Where a mortgaged creditor pursues mortgaged property in the hands of a third possessor, he cannot pursue another portion of the property subject to the same mortgage, in the possession of another purchaser, while he insists on his right to have the property in the hands of the first purchaser sold, or until it is discussed.

This is an hypothecary action, in which the plaintiff was required to discuss property previously liable to his mortgage, in the possession of Dumartrait. A judgement in favor of Dumartrait by the District Court, in the case just acted on, proceedings were had in the present suit, the property seized in the possession of the defendant was ordered to be sold, and he appealed.

As the plaintiff did not acquiesce in the judgement of the District Court in favor of Dumartrait, but insisted on his right to have the property in the possession of the latter sold, his proceedings in the present suit were premature.

WESTERN DIS. Sept. 1832.

PATTERSON vs. BLOSS ET AL.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be annulled, avoided, and reversed; and the case remanded, with directions to the judge, not to proceed thereon until after the discussion of the property in the possession of Dumartrait, the appellee, paying costs in this suit.

PATTERSON *vs.* BLOSS ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

In a contract for the alienation of lands and improvements, on failure of the vendee to comply, parole evidence is inadmissible to prove the noncompliance and damages resulting therefrom to the vendor.

He who claims damages for the inexecution of a contract, must prove that it was actually entered into, in the same manner and by as high evidence as if it required a specific performance.

Parole evidence, in a claim for damages on failure of the vendee to comply with a contract for real property, is inadmissible even as a beginning of proof.

The plaintiff sues the defendants for the specific performance of a contract, and for damages in delaying to perform it. He alleges the defendants contracted with him for a lot, store and warehouse, in the Dutch Prairie in the parish of St. Mary, for the sum of one thousand eight hundred dollars, payable in three instalments; that he delivered, and the defendants took possession of the premises about the 12th of March, 1831. He states that soon afterwards he applied to defendants for their negotiable, endorsed notes, payable at the several periods agreed on, and tendered them the title

deeds to the property, all which they refused. About the 29th of July of the same year, he made, through his agent, a similar proposition to receive their notes and execute title deeds, which was again refused. He further states, that he has lost considerably by relinquishing a profitable mercantile business and selling his said property to the defendants; and also, by the depreciation of property, loss of rent, and the use of the notes he was to receive for said property. He prays that they be compelled to abide by, and complete their contract according to agreement, and pay one thousand dollars in damages, &c.

The defendants plead a general denial. On the trial, "the plaintiff, under the decision of the court, restricted his claim to damages for the nonperformance of the contract." The plaintiff offered a letter from Dr. Field, one of the defendants, in evidence to the jury, to support his claim to damages, which was objected to by defendants' counsel, but admitted by the court, and a bill of exceptions taken. In the bill of exceptions is the following note: "The plaintiff abandoned all claim to the specific execution of the contract, and claimed only damages for not carrying it into execution, and it was admitted only as evidence to prove his said claim to damages."

A bill of exceptions was taken to the decision of the court allowing the plaintiff to prove the sale to the defendants, by parole testimony, "as not being the legal manner of proving the transfer of real estate."

Another bill of exception was taken to the opinion of the court in allowing a witness to be recalled to explain his testimony, after arguments of counsel had commenced, and the testimony first given, taken down in writing.

The plaintiff proved, by parole testimony, the sale by him of the lot, store and warehouse, in Dutch Prairie, to defendants, and that they occupied and did business, as merchants, on the premises. He showed a letter of attorney appointing T. E. Ives his agent to demand and receive from defendants the notes for the property, and to tender them title deeds to the same. Mr. Ives's testimony showed that he offered to

WESTERN DIS. Sept. 1832.

PATTERSON vs. BLOSS ET AL.

fulfil the contract on the part of the plaintiff, which was refused by defendants. The defendants, after occupying plaintiff's property for some months, left it and built a store within twenty-five yards of it. The price of rents and property had fallen since.

There was a verdict and judgement for plaintiff for two hundred dollars in damages. After an ineffectual attempt to obtain a new trial, the defendant appealed.

Brownson, for the plaintiff:

1. The only question in this case arises on the admissibility of parole evidence to prove the nonperformance of a contract for immovable property. The plaintiffs having elected to proceed on their claim for damages had a right to introduce parole evidence to show the amount of damages sustained by the nonperformance of the contract.

2. The defendants having obtained possession of the plaintiff's property by false pretences, are liable in damages. Parole evidence is always admissible to prove damages resulting from misconduct or the nonperformance of engagements contracted.

Garland, for the defendants:

1. We contend that the letter of Dr. Fields, one of the defendants, is inadmissible evidence in this cause; it cannot be received as a commencement of proof in writing to prove a contract in relation to the sale and transfer of real property. The commencement of proof in writing is not recognised by the Louisiana Code. *Old C. Code, p.* 310. *L. Code, art.* 2255.

2. Parole evidence is inadmissible to show that the contract for the lot and house was actually made, or to prove any other fact relating to the making of such contract, which would be allowing parole evidence to prove a contract for the transfer of real estate, which cannot be done. *L. Code*, 2255. 3 *Mar. N. S.* 424.

3. The District Court erred in permitting a witness to be examined after the argument of the cause commenced, when his testimony had been previously taken down by the clerk. *C. Pr.* 484, 601.

4. The defendants were not put in default before bringing suit, in the manner required by law.

5. They are charged with a passive violation of the contract, which requires that they should be put in default before a recovery can be had. *L. Code*, 1927. 6 *Mar. N. S.* 229. 3 *Lou. Rep.* 97.

6. The mode pointed out by law to put the party in default, is found in the *Lou. Code, art.* 1905—7. *C. Pr.* 410—12.

7. When a contract is to be reduced to writing, either party may retract before the written agreement is signed, though possession of the property is previously given. 1 *Mar. N. S.* 430.

MARTIN, J., delivered the opinion of the court.

The plaintiff, who in his petition had claimed the specific performance of a sale of land and damages for its nonexecution, after the jury were sworn and under the direction of the court, restricted his claim to damages for the nonperformance of the contract. There was a verdict and judgement for the plaintiff, and the defendants appealed after an unsuccessful attempt to obtain a new trial.

In a contract for the alienation of lands and improvements, on failure of the vendee to comply, parole evidence is inadmissible to prove the noncompliance and damages resulting therefrom to the vendor.

He who claims damages for the inexecution of a contract, must prove that it was actually entered into, in the same manner and by as high evidence as if it

It appears to us the jury erred. The contract was for the alienation of land, and the plaintiff did not offer any written evidence of it, although it was denied by the answer. His counsel has contended that as damages only are claimed, and not the performance of the contract, parole evidence is sufficient. Such a distinction cannot be admitted. The law requires that every contract for the alienation of land be reduced to writing, and forbids the admission of parole evidence of it. There is, however, an exception to it, but the present case is not within it. *Lou. Code*, 2255.

He who claims damages for the inexecution of a contract, must prove that it was actually entered into, in the same

WESTERN DIS. *Sept.* 1832.

MINOR'S HEIRS *vs.* HARDING.

manner as if it required the specific performance of it. The introduction of parole evidence has, however, been attempted to be claimed, on the ground of some beginning of proof. Whatever may have been the law in regard to the faculty of introducing parole evidence, after offering a beginning of proof in writing, our present codes are absolutely silent in this regard; and the former part of our jurisprudence must share the fate of the legal provisions existing before the new codes of which they make no mention.

required a specific performance.

Parole evidence, in a claim for damages, on failure of the vendee to comply with a contract for real property, is inadmissible even as a beginning of proof.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be annulled, avoided, and reversed, and that there be judgement for the defendants as in case of a nonsuit, with costs in both courts.

MINOR'S HEIRS *vs.* HARDING.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

The declaration of an administrator, that he believes an account to be just, and his promise to pay it, on its attestation by the judge, when he is in funds, do not bind the heir who accepts or inherits the estate.

Where parole evidence discloses the fact that the rate of interest in a sister state is fixed by statute, the statute itself must be produced, as the best evidence to prove the the rate of interest in such state.

This suit is instituted by the heirs and representatives of the late Stephen Minor, formerly of Natchez, against Winthrop S. Harding, as the only heir of Lyman Harding, deceased, for the recovery of one thousand and seventy-eight dollars and

eighty cents, the balance alleged to be due on an account for money loaned to L. Harding by S. Minor, about the year 1820. They both resided in Natchez, in the state of Mississippi. The defendant is a resident of the parish of St. Mary, in this state. L. Harding died soon after these loans, and in 1824, one William B. Griffith was appointed administrator of his estate, by the Orphans' Court of Mississippi. The representative of Minor's estate presented to the administrator of Harding, the account of the former against the latter, sworn to. The administrator wrote under it that "he believed it correct, and would pay it as soon as he was in funds belonging to the estate of L. Harding." The account was also presented to the Orphan's Court, examined, and allowed by the certificate of the presiding judge. In 1826, Griffith, the administrator, died. In 1827, the defendant attained the age of majority, and took possession of all his father's property, both in Mississippi and Louisiana, being the only heir. This suit was commenced in March, 1830.

The defendant pleaded a general denial. The plaintiffs exhibited proof of their account. Parole evidence was offered and excepted to, to prove the rate of interest in Mississippi. Judge Lewis deposed that it was eight per centum, and fixed by the statutes of that state. The defendant objected, requiring a certified copy of the statute itself, as the best evidence. There was judgement for the plaintiff, for one thousand and seventy-eight dollars and eighty cents, including interest at eight per centum. The defendant appealed.

Bowen, for plaintiffs:

1. We show by testimony in the case, that the defendant admitted the plaintiffs' account about the time he came of age, and promised to settle it after deducting one thousand dollars left him as a legacy by plaintiffs' ancestor.

2. By the pleadings, nothing is put in issue but the debt. The general issue puts in issue the merits alone, and not any collateral facts or circumstances. See 1 *L. Rep.* 282. *Ibid*, 111.

WESTERN DIS. Sept. 1832.

MINOR'S HEIRS vs. HARDING.

3. The general issue admits residence. 12 *Martin*, 539.

4. The admissions of the administrator, that the account was correct, and its having been audited by the proper officer, are evidence of its correctness against the defendant. 3 *L. Rep.* 274. 2 *Starkie on Ev.* 59–60.

5. The promise of the defendant, to pay the debt, binds him. It is objected, that he was a minor when he made this promise. This was an affirmative fact for him to prove, and not to be rendered barely probable; but the weight of testimony is against him.

6. The *onus probandi* is on him who pleads minority. This doctrine has been recognised by this court. 3 *L. Rep.* 86.

7. By the common law, the governing rule in Mississippi, interest is due on all unliquidated demands, such as an account stated, &c. 1 *Selwyn, N. P.* 392. 15 *Johns.* 409.

8. As to the question of interest, the rule of evidence, that foreign laws must be proved as facts, and that the courts will not judicially take notice of them, can scarcely be applicable to a law of a sister state, of such notoriety as the rate of interest.

Brownson, for the defendant:

1. The approval of the account by the administrator, and his promise to pay it, does not bind the heir. He is not authorized to contract engagements against the estate he represents except within the scope of his authority; nor can he contract any new debt nor admit the existence of old ones, unless they are supported by competent proof. His promise may bind him personally, but not the heirs and representatives.

2. Neither the admission of the debt by the administrator, or by the defendant while a minor, is any legal evidence of that fact. *Sirey*, 197, *word*, "*Confession*," *no.* 1. *Poth. on Ob. vol.* 2, *no.* 803; the maxim of the civil law is, *qui non potest donare non potest confitire.*

3. It is contended the defendant has the affirmative to prove, *when* he arrived at full age. I admit it, and he has done so. But I return the argument. The plaintiffs have the affirmative to prove, *when* the promise was made; for if time is material, the plaintiff is bound to show it, in order to give effect to the promise.

4. A witness has been called to prove the rate of interest in Mississippi. This testimony is to be governed by the ordinary rules of law; one of which is, that the best evidence must be adduced. The witness states, that the rate of interest is eight per centum, and fixed by a statute of that state. This court has uniformly decided, that when it appeared that the laws of another state were written, they should be proven by authenticated copies.

Bowen, in reply and conclusion:

1. It is said the acknowledgement of the administrator cannot bind the heir, because he cannot contract new debts. But he can ascertain and settle existing debts of the estate; and is appointed as well to pay the debts it owes, as to collect those due to it. The positions of the opposite counsel would compel every creditor of an estate to commence suit for his debt, even when the legal representative was willing to admit it. The ruinous consequences of burthening the succession with numerous law suits and interminable costs are obvious, if the course indicated were followed out.

2. The course pursued with this debt, is the one pointed out by our *Code of Practice*, *art.* 985.

3. The creditor of a succession can only sue when its legal representative refuses to acknowledge his claim. *Ibid.* 984, 986.

4. The acknowledgement of the debt by the legal representative of the estate, has the same legal effects as a judgement obtained against him by a creditor. *Ibid.* 985—7.

5. Such a judgement is as binding against the heirs as if obtained against them. 3 *L. Rep.* 274.

WESTERN DIS. Sept. 1832.

MINOR'S HEIRS vs. HARDING.

MARTIN, J., delivered the opinion of the court.

The plaintiffs claim the amount of an account presented by them to the administrator of the estate of the defendant's ancestor, in the state of Mississippi, on which the administrator wrote, he believed it to be just and would pay it when in funds; and which was afterwards examined, allowed, and directed to be certified, by the chief justice of the Orphan's Court, as appears by a note written by him on the account. It is further shown the account was presented to the defendant, in this state, and he promised to pay it, on a deduction of one thousand dollars, left him by the plaintiffs' ancestor. There was judgement against him, and he appealed.

The declaration of an administrator, that he believes an account to be just, and his promise to pay it, on its attestation by the judge, when he is in funds, do not bind the heir who accepts or inherits the estate.

We are clearly of opinion the belief of the administrator, and his promise on the attestation of the chief justice of the Orphan's Court, do not bind the heir. The chief justice did not hear any party or witnesses, and there was no suit pending before him or his court; and the administrator, though he could pay the debts of the estate, could not create one against it.

The defendant has claimed an exemption of performing his promise, on an allegation of his minority at the time he made it. On the examination of the testimony in this respect, we concur in the opinion of the District Court, who concluded the minority was not satisfactorily proven.

Where parole evidence discloses the fact, that the rate of interest in a sister state is fixed by statute, the statute itself must be produced, as the best evidence to prove the rate of interest in such state.

His counsel has objected to the charge of interest in the account. Evidence was given of the legality of the charge in the state of Mississippi, by a witness who deposed it was allowed by a statute. This testimony was objected to, as the statute ought to have been produced. The objection ought, in our opinion, to have prevailed, and the judgement, in this respect, is erroneous, in allowing interest.

The sum of one thousand dollars was properly deducted for the legacy, and the plaintiffs are entitled to the balance of the account, after deducting the interest.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be annulled, avoided, and

reversed; that the plaintiffs recover from the defendant five hundred and forty dollars, with costs of suit in the District Court, they paying costs in this.

ETIE'S HEIRS vs. CADE ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

The delivery of titles is a legal presumption of mandate; but the presumption thus arising may be repelled by proof that the papers were delivered to the agent for another purpose.

Since the adoption of the Louisiana Code, the presence of an under tutor is not required by law, at the making of an inventory of the succession belonging to the minor heirs he is appointed to represent.

An advertisement of a sale at thirty days notice will suffice, if published once a week during that time; but if the newspaper is omitted to be published a week or two during this interval, the law does not require the advertisement to be made anew or the sale to stop.

In sales at ten or thirty days notice, it is sufficient if the advertisement be placed on either the court house or church door; both is not required.

Purchasers at judicial sales cannot be affected by the mistakes of agents in carrying into execution judgements, at a time not contemplated by their principals.

The plaintiffs, as the legal heirs of Pierre Etie, deceased, sue Robert Cade and James T. White, for the recovery of a tract of land, twelve and a half arpens by forty, on each side of the bayou Vermillion. Pierre Etie, the ancestor and

WESTERN DIS. Sept. 1832.

ETIE'S HEIRS vs. CADE ET AL.

person from whom the plaintiffs derive their claim, died in the parish of St. Mary, in 1821, leaving this land as a part of his succession. In December of this year, a family meeting was held, of the heirs and legal representatives of the deceased, at which it was determined, and accordingly ordered, that the whole of the succession should be sold at public auction, on certain terms and credits specified. The land now claimed was ordered to be sold, on the petition of E. Simon, Esq., attorney for the plaintiffs, by the parish judge of St. Mary, on the terms agreed on by the family meeting. This order was granted April 25, 1826. Mr. A. Dumartrait, acted as agent of plaintiffs, under a verbal authority, and directed the parish judge of Lafayette, where the land was situated, to sell it at public auction. It was advertised in the Attakapas Gazette and at the church door, in the parish of Lafayette, to be sold on the 26th June, 1826, and postponed to 26th July following, for want of bidders; the sale, again postponed until January 25th, 1827, and being duly advertised each time, as before, it was adjudicated to John Greig, for five hundred and twenty dollars. On the same day, Greig conveyed one undivided half of the land to B. C. Crow. In September, 1828, Greig and Crow sold and conveyed the whole tract to Robert Cade and James T. White, for five thousand dollars, payable in four annual instalments.

The petitioners now sue to recover back this land; alleging the sale of it, by the parish judge of Lafayette, to be made without legal authority and the forms prescribed by law. They allege, that the petition presented by E. Simon, Esq., on which the order to sell the land was made, was obtained without their authority, knowledge, or consent; and that A. Dumartrait was not their legal agent, or attorney in fact, to sell, or in any wise dispose of this land. They pray that the sale, made by the parish judge of Lafayette, be declared null and void, and that they be quieted in their title to the land; and also for two thousand dollars in damages.

The defendants, Cade and White, set up the sale from Crow and Greig to them, and called the latter in warranty.

the latter answer, and rely on the sale of the parish judge to them, &c.

There was judgement, stating that this property was originally vested in Pierre Etie, deceased, and did not make a part of the community between said Etie and his wife; and that all the forms of law, required to make a good and sufficient title in favor of the purchasers, have been complied with. They were decreed to be for ever quieted in their possession; the plaintiffs to pay all costs.

E. Simon, sworn as a witness for plaintiffs, says, the petition signed by him for the appraisement and sale of this tract of land, in the name of the plaintiffs, was drawn by him at the request of A. Dumartrait, who said he was their agent. Witness never had any communication with plaintiffs on the subject.

A. Dumartrait sworn, says, he had no written authority from the plaintiffs, to sell the land in contest, except a letter from one of them: that he had verbal authority from the plaintiffs, to settle Pierre Etie's succession, and had acted as their agent ever since 1824. (This evidence objected to.) At the family meeting, ordering the sale of the succession, N. Loisel was appointed under tutor to one of the heirs under age.

One witness stated the land in dispute worth two thousand dollars in May, 1828. Another says, he would not have given five hundred dollars for it, about the time of the sale.

A third says, he knew a Mr. Rice, who intended to have given one thousand dollars for it, but did not reach the place of sale in time. The title to the land was clear.

Garland, for plaintiffs:

1. No person or public officer can sell and convey a good title to the property of another, unless authorized by express law, which must be strictly pursued and all its formalities complied with; especially as regards the successions or property of minors. If the sales are otherwise, they are null. 6 *Whea-*

WESTERN DIS. Sept. 1832.

ETIE'S HEIRS vs. CADE ET AL.

ton, 116, 277. 11 *Martin*, 607. 1 *Martin*, *N. S.* 324, 628. 9 *Martin*, 489. 10 *Martin*, 283.

2. There is no petition, in this case, to the judge, requesting him to call the family council, or order to do so, at which this sale was ordered. *Old C. Code, p.* 62, *art.* 21.

3. The family meeting did not first appoint an under tutor to the minor heirs, previous to ordering the sale; and no under tutor was present at the making the inventory. 3 *Martin's Dig.* 128, §22. 132, §19. 1 *Martin, N. S.* 462.

4. The order of the parish judge of St. Mary, on the petition of E. Simon, Esq., ordering the sale in 1826, is null, because it was procured through the agency of A. Dumartrait, without the knowledge of the plaintiffs.

5. A. Dumartrait acted under a verbal power from some of the heirs, given generally, which was insufficient to authorize the sale of land.

6. When the mandate is given generally, it only confers a power of administration. *L. Code*, 2960. The power to sell must be express. *Ibid.* 2966.

7. The agent cannot exceed the limits of his appointment; and under a general power he cannot sell a slave. *L. Code*, 2979. 10 *Martin*, 679. 1 *Martin*, *N. S.* 244.

8. An agent, empowered to pay and receive the debts of a succession, cannot accept or receive notices of transfer of debts against it. 8 *Martin*, *N. S.* 212.

9. A power to sign the constituent's name, in any transaction the attorney may deem necessary for his principal, does not authorize him to endorse a note, and a power to sell does not authorize a *dation en payement*. 1 *Martin*, *N. S.* 608, 444.

10. The authority of an attorney may be questioned and denied by the parties whose names he used, when his acts are relied on to make out a chain of title, depriving them of their property.

11. The order of the Probate Court, made upon such petition, may be impeached, and its validity inquired into, when set up as the basis of title. *C. P.* 99. 2 *L. Rep.* 137, 147. *C. P.* 608, 610.

12. The acts of neither the agent or attorney have been ratified by the heirs, which is required to be express, and made in the same manner as the original act, unless the principal voluntarily agreed to it. *L. C.* 2251-2, 2990.

13. The inventory of this land, made in Lafayette, has never been recorded in the parish of St. Mary, where the succession of Etie was opened, nor has any return or evidence of it been given. *L. C.* 1103.

14. The sale was illegally made by the parish judge of Lafayette; not being advertised according to law. 8 *Martin, N. S.* 246. *L. C.* 336, 1108.

Brownson and *Crow* argued on behalf of the defendants.

PORTER, J., delivered the opinion of the court.

The plaintiffs state they are owners of a tract of land, of which the defendants are illegally in possession; that the land was sold by the judge of probates of the parish of Lafayette, under an order of the Court of Probates, of St. Mary parish. That the petition on which this order was obtained, was filed without the knowledge or authority of the petitioners, and is not binding on them. They also pray for possession of the premises, and to be quieted in their title.

The defendants pleaded the general issue, and averred they purchased from certain persons, viz: B. C. Crow and J. Greig; and prayed they might be cited in warranty.

Crow answered, by denying any title in the plaintiffs, and alleging that he purchased from Greig. Greig admitted he had sold the land to the persons calling him in warranty; and averred that he had bought it at a sale by public auction, in the parish of Lafayette, on the 25th January, 1827; that the sale took place in virtue of an order of the Court of Probates of the parish of St. Mary; that it was conformable to law, and that he purchased in good faith, and not with any view to defraud the petitioners.

WESTERN DIS. Sept. 1832.

ETIE'S HEIRS vs. CADE ET AL.

On these issues the parties went to trial in the court below. There was judgement for the defendants, and the plaintiffs appealed.

The sale appears to have been fairly conducted, and there is no allegation of fraud, or intention to injure the petitioners, either in the persons who procured the order of the Court of Probates, the judge who sold, or the defendants who purchased the premises. But the land, since the time of sale, has greatly risen in value; and the plaintiffs allege, that the alienation took place without any authority from them, and contrary to the forms of law in such cases provided.

So far back as the year 1822, a family meeting took place, before the judge of St. Mary, and which advised a sale of all the property, real and personal, of which the ancestor of the plaintiffs died possessed. Under this advice, the judge ordered the sale; but after several attempts, the tract now in dispute could not be disposed of, for want of bidders; and it remained the property of the succession up to the year 1826.

In that year, a petition was presented to the judge of St. Mary, signed by E. Simon, Esq., a duly licensed attorney of the courts of this state. The petition is in the name of the heirs who are now plaintiffs. It refers to the previous deliberations of the family; states the property had not been yet sold, and that a sale is necessary to pay the debts. It asks the judge for an order for a new appraisement and sale of the property. Both were given by the judge, according to the prayer of the petition, and under this order the sale now attacked took place.

Evidence was offered in the court below, to show that the attorney had been employed by an agent who was appointed with a general authority, but was not empowered to sell the property belonging to the estate; and the heirs knew nothing of the proceeding. This evidence was rejected, as contradicting the record, and several questions, in relation to the power of attorneys at law, and the effect of their acts in binding the persons they profess to represent in courts of justice, have been fully and earnestly argued. We find it

unnecessary to decide them. The evidence comes up in the record subject to exceptions, and it convinces us the heirs had a knowledge of the proceedings by which the agent sought to procure a judicial sale of the land. In the first cause between the parties, in relation to the matter now under litigation, which terminated by a nonsuit (the record of which is made evidence in this case), the agent, who was called as witness by the plaintiffs, swore that he communicated the fact of the failure to sell, in the two first exposures, to the heirs. On the trial in this case, he deposed he communicated the fact to the mother and one of them. The property was advertised eight or nine times, in a newspaper published in the county they lived in; and more than all, it appears the title papers for the land were placed in his hands, and by him forwarded to the purchaser.

The delivery of titles is a legal presumption of mandate; but the presumption thus arising may be repelled by proof that the papers were delivered to the agent for another purpose.

Pothier states it to be a legal presumption that a delivery of titles is a mandate. This presumption, indeed, may be destroyed by proof, if the papers were delivered to the agent for another purpose. But no such proof is offered here. It may be true, that courts of justice can examine into the authority of attorneys at law; and it is possible the judgement rendered where they were not properly empowered, may be set aside. But it is obvious to what consequences such a doctrine might lead. And how strict and full the power should be, which would authorize a sentence of nullity on this ground. The communications between client and counsel are generally private. There is not one case in ten where the attorney is empowered in writing. Third parties are entire strangers to the circumstances which led to, or accompanied his engagement; and such evidence as was given here is as satisfactory as could be expected. *Poth. on Ob.* 849.

Since the adoption of the Louisiana Code, the presence of an under tutor is not required by law at the making of an inventory of the succession belonging to the minor heirs he is appointed to represent.

It is next objected, the inventory was not regularly made, as the under tutor did not assist at it. By the 329th article of the Louisiana Code, his presence is not necessary. But it is contended the 54th article of the old Code, page 68, was still in force, and unrepealed at the time the inventory was

WESTERN DIS. Sept. 1832.

ETIE'S HEIRS vs. CADE ET AL.

made. The French text of that article did not require the presence of the under tutor; the English did. The new Code adopted the former. We think this was special legislation on this matter, which, according to the 3521 article of the Louisiana Code, repealed the provisions in the English text of article 54, of the old Code.

Another informality is urged. The property, it is said, was not advertised regularly in the newspaper. If it were not, it is very questionable whether the major heirs can take advantage of this neglect of their agents. But we think it was legally advertised. By the 1110 article of the Code of Louisiana, it is sufficient if the advertisement in sales at ten days, be published as often as the gazette appears during that time. In those cases where thirty days notice is required, it is true it is stated, it will suffice if they are published once a week during that time; but where the argument *contrario senseu* is drawn from this provision, and it is attempted to show sales are null, if not advertised once a week during that period, it must be received without at least the limitation of a gazette being published each week in the month. Here there was an interval of one week, in which the newspaper was not printed; consequently, the advertisement could not be inserted. We know of no law which requires the Parish Judge to stop proceedings on that account; commence advertising anew, and expose himself to the same contingencies the second time. The law requires what is practicable, to advertise if there be a paper printed, in which the notice can be inserted; and, in our judgement, it requires nothing more.

An advertisement of a sale at thirty days notice will suffice, if published once a week during that time; but if the newspaper is omitted to be published a week or two during this interval, the law does not require the advertisement to be made anew or the sale to stop.

The objection as to the want of placing the advertisement on both church and court-house doors, is removed by the 1108th article of the Louisiana Code, which makes it sufficient to affix them on either. The law being passed since the adoption of the constitution, the English text must control the French.

In sales at ten or thirty days notice, it is sufficient if the advertisement be placed on either the court house or church door; both is not required.

It was contended the Parish Judge, acting as auctioneer, put up this property for sale, when he was not authorized to do so by the plaintiffs or their agents; he had twice announced

Purchasers at judicial sales cannot be affected by the mistakes of agents in carrying into execution judgements at a time not contemplated by their principals.

it by the order of the latter, and no positive orders countermanding a further exposure, were given to him. But it is our opinion, that purchasers at judicial sales, cannot be effected by the mistakes which agents may make in ordering judgements to be carried into execution at a time not contemplated by their principals.

In the petition, it is stated one of the heirs was a minor at the time of the sale, and it is necessary to examine the legality of the proceedings in reference to him. The petition to the Judge of Probates, for the order to sell the property, refers to the deliberations of the family meeting, as authorizing such an order. They are attacked principally on the ground, that they were not preceded by a petition, to call the meeting. Whether this be such an irregularity as would annul the proceeding, we need not inquire; for all the parties signed the deliberations, and showed they sanctioned and approved of the meeting; the widow appeared as representative of the minors, and signed it; and the heirs of age, affixed their names to it. We do not see the force of the objection made in relation to the tutor; he signs the proceedings in that character, and we must presume, have acted as such, as there were a sufficient number of friends and relations independent of him, to form the meeting; his appointment is evidenced by an act made the same day, and posterior to the advice of the family meeting. But the appointment was reduced to writing and recorded subsequently, it furnishes no reason to assume, that it was not made earlier in the day; more particularly when we see the tutor previously signed the deliberations as such. These proceedings, we think, formed a proper basis for the petition subsequently addressed to the judge of probates, to order a sale of the property, for the payment of the debts due by the succession; and it is clearly proved, the tutrix of the minor knew of the petition filed by the attorney at law for this purpose, and sanctioned it. *Moreau's Dig. vol.* 2, *p.* 88, §5.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be affirmed, with costs.

WESTERN DIS. *Sept.* 1832.

STOUTE vs. VOORHIES ET AL.

STOUTE vs. VOORHIES ET AL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

The articles 2588—90, of the Louisiana Code, relate to sales by auction, both voluntary and forced, and not to sheriff's sales; and the articles 2588-9, are particularly applicable to voluntary sales.

The articles 690—95, of the Code of Practice, relate to sheriffs' sales, which transfer to the purchaser all the rights of the party to the property in whose hands it is seized. The sheriff is allowed three days to make out an act of sale in form, but is not bound to do so, until the purchaser complies with the terms of sale.

So if a sale is made for cash, and the highest bidder to whom it is bid off, fails to make immediate payment, the sheriff may set up the property and sell it anew, without re-advertising, and after the hours of sale have elapsed.

There is no positive municipal regulation or principle of law, forbidding several persons at a sheriff's sale from combining together, and agreeing for the bid of one, to be taken for all of them, to prevent competition in bids.

The plaintiff in this case, had become the purchaser of a tract of land in July, 1830, sold at sheriff's sale, for which he executed a twelve months bond, with security. In 1831, an execution issued on this bond, was levied on this tract of land, which was advertised to be sold for cash at the court house door in Vermillionville, the 25th of August, 1831, between the hours of ten and three o'clock in the afternoon. The plaintiff, with the defendant and several other persons, bid against each other, when about fifteen minutes past three o'clock, it was adjudged to the plaintiff as the last and highest bidder, for five hundred and ninety-five dollars. The sheriff immediately demanded of the plaintiff the price of his bid, who informed him he would be ready to pay the money next morning, and receive a title. The sheriff refused to

wait; the plaintiff then offered to give security to furnish the money in the morning; but the sheriff immediately put up the land at public sale, against the will of plaintiff, after the hour stated in the advertisement had elapsed, when the defendant and the other bidders combined together, and agreed that one should bid for all of them. The land was adjudged the second time to the defendant Voorhies, and his associates, for the sum of one hundred and ten dollars. The plaintiff alleges the land became his by his bid, and that he had a right to twenty-four hours in which to make payment; and that he was ready to comply, and never refused to comply with his bid and the terms of sale; and that the adjudication to the defendants is null and void: 1. Because the sheriff omitted to re-advertise the land. 2. Because he refused a reasonable time to the plaintiff to make payment and rejected his bid illegally. 3. Because the hours mentioned in the advertisement, limiting the time of sale, had expired before it was again offered. 4. Because of an illegal and fraudulent conspiracy between Voorhies and his associates, by combining together to prevent the land from bringing its real value, and also to prevent competition among bidders, &c.

The plaintiff prays that the sale to defendants be annulled, and declared of no effect.

There were separate answers by some of the persons charged as defendants, denying they had any interest in the purchase. C. Voorhies, J. J. Neveu, J. Casteneau, and André Martin, pleaded a general denial, and that they were guilty of no fraud or collusion, but that the sheriff's sale to them was legal and valid; and they prayed that it be confirmed, &c.

There was judgement for the defendants, quieting them in their title to the property purchased.

The plaintiff appealed.

It was proved that the property was put up immediately and resold, after the hour in the advertisement had expired; that the defendants were engaged in the purchase, but had

WESTERN DIS. Sept. 1832.

STOUTE vs. VOORHIES ET AL.

arranged it, so that only one of them was to bid. It was also shown by the plaintiff, that he could have raised the money to pay for his bid the next day, and have given good security in the meantime, until the money was paid. The land sold and purchased by defendants, was estimated by witnesses to be worth from two thousand to two thousand five hundred dollars.

Garland, for plaintiff, contended:

1. That the second adjudication is null, because the first adjudication to the plaintiff vested a title in him, which cannot be divested but by certain legal formalities. *C. P.* 690–95, *La. Code*, 2586.

2. Because the plaintiff was entitled to retain the price, until the sheriff made a deed; who had no right to offer the land anew, until he had made a tender of the deed, for which three days, or twenty-four hours at least, are allowed. *La. Code*, 2588, *C. P.* 691.

3. Because the sheriff failed to re-advertise the property on the second sale, and refused to wait any time for the first purchaser to pay the money, though he was informed he had it. *La. Code*, 2589.

4. Because the sheriff offered the land for sale the second time, after the hour had elapsed within which it was advertised to be sold, and it was not advertised at all on the church door, as required by law. *C. P.* 667–8, 677.

5. Because of an illegal conspiracy among the defendants, to defraud the plaintiff, and purchase his property at a great sacrifice. 3 *M. N. S.* 70, 46. 1 *Cowper*, 395. 6 *Durn. and East.* 299, 6 *Johns.* 194, 8 *do.* 444.

MATHEWS, J., delivered the opinion of the court.

In this case, the plaintiff prays to have an adjudication and sale of his property, made by the sheriff of the parish of Lafayette, annulled, in consequence of informalities in the adjudication, and of an unjust and fraudulent combination

between the bidders, the present defendants, to obtain the property sold for a price far below its real value. Judgement was rendered in favor of the defendants in the court below, from which the plaintiff appealed.

The principal ground of informality in the conduct of the officer, relied on for a rescission of the sale, as it appears by the evidence of the case, is the adjudication of the property after the time prescribed by the advertisement. It was advertised to be sold between the hours of ten o'clock in the forenoon and two in the afternoon, of the 25th of August, 1831. It appears by the evidence of the sheriff, that he delayed offering the property for sale until after one o'clock, at the request of the plaintiff, who bid for it to the amount of five hundred and ninety-five dollars, and being at that price the last and highest bidder, it was struck off to him; but he failing to pay this sum by him bid, the officer about three o'clock or some time after, again put the property up for sale, and at this time, it was adjudged to Voorhies, one of the defendants, as the highest bidder, and was afterwards conveyed by the sheriff to him and several other of the defendants.

From these facts, the question arises, whether the sale was not illegal, as not having been made in the manner prescribed by law, and contrary to the notice publicly given. It is proper, however, to settle a previous question, raised by the plaintiff's counsel, relating to the right acquired by the bid of the former purchaser, although he did not immediately comply with the condition of the sale, which was for cash.

In support of this right, reliance is had on the articles of the *Code of Practice*, 690—95; and on the articles of the *Louisiana Code*, 2588—90. The provisions of the Louisiana Code, relate to sales by auction, both to voluntary and forced sales; but we are of opinion that the article 2589, is particularly applicable to voluntary sales, as is also the preceding article.

The articles 2588—90, of the Louisiana Code, relate to sales by auction, both voluntary and forced, and not to sheriffs' sales; and the articles 2588—9, are particularly applicable to voluntary sales.

The Code of Practice relates to sheriffs sales, and according to the articles cited, an adjudication has the effect of

The articles 690—95, of the

WESTERN DIS. *Sept.* 1830.

STOUTE vs. VOORHIES ET AL.

transferring to the purchaser all the rights of the party in whose hands the property was seized; and the sheriff is allowed three days, within which he must make an act of sale in form. This transfer of rights, does not, in our opinion, take place; and, consequently, the officer is not bound to perfect the sale by an act translative of them to the purchaser, unless the latter has complied with the conditions of such sale. The condition of the adjudication in the present instance, was, that the purchaser should pay cash; this he was unable to do, and the sheriff was authorized to expose the property to sale anew, and adjudge it to another person. *Code of Pr.* 689.

Code of Practice, relate to sheriffs' sales, which transfer to the purchaser all the rights of the party to the property in whose hands it is seized. The sheriff is allowed three days to make out an act of sale in form; but is not bound to do so until the purchaser complies with the terms of sale.

So if a sale is made for cash, and the highest bidder to whom it is bid off, fails to make immediate payment, the sheriff may set up the property and sell it anew, without re-advertising, and after the hours of sale have elapsed.

The authority of the officer thus to proceed, is not in any manner controled by the article 2589 of the Louisiana Code; that article applying more particularly to voluntary sales.

We must now examine the alleged illegality of sale, as having been made after the hour announced by the advertisement. Whether a sheriff would be authorized to expose property seized, for sale anew, in consequence of the non-compliance of a bidder (not the defendant in execution) with the conditions of the sale after the expiration of the hours of sale, we need not inquire in the present case. All the delay in the adjudication, was occasioned by the conduct of the plaintiff, and he ought not to be allowed to profit by his own misconduct, to the prejudice of a fair and *bona fide* purchaser. It is shown by evidence, that the officer postponed crying the property at the request of the defendant in execution, until a late period of the time as advertised, and when struck off to him, he failed to comply with the conditions of the adjudication. We are, therefore, of opinion, that the sheriff was authorized immediately to proceed to adjudicate the property seized, to any other person.

There is no positive municipal regulation or principle of law, forbidding several persons at a sheriff's sale, from combining together, and agreeing for the bid of one to be taken for all of them, to prevent competition in bids.

As to the want of honesty in the conduct of the persons to whom the adjudication was made, it is not shown that they acted in violation of any positive municipal regulation; and the morality or immorality of their proceedings, is involved

in so much doubt, as not to form a proper basis for a decree annulling the sale.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be affirmed, with costs.

EASTIN *vs.* DUGAT.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Amendments are admissible at any stage of the case previous to trial, and will always be admitted when they promote justice.

After the defendant has answered, if he becomes the owner of the claims on which suit is pending against him, he may amend his answer and plead confusion of claims; and if he had pleaded any other matter inconsistent with the general issue, it would have been a waiver of that plea only.

But if the defendant omits to plead confusion and lets judgement go, the doctrine of *res judicata* does not apply. He does not thereby lose the benefit of a defence by not profiting by it in time.

The defendant has two remedies, either to plead confusion of claims and prevent judgement, or if the plaintiff proceeds to judgement and sues out execution, it may be perpetually enjoined.

An injunction will not be dissolved when the facts of the case show that on its dissolution the party will immediately be entitled to another on an application in another form.

This suit commenced by injunction. Dugat, the present defendant, instituted suit, and in May, 1831, recovered judgement against Eastin for three hundred and fifty dollars and costs. But during the pendency of this suit, P. Wartelle &c.

WESTERN DIS. Sept. 1832.

EASTIN vs. DUGAT.

obtained a judgement against Dugat for dollars, levied execution on the suit of Dugat against Eastin, and on the 23d of November, 1830, all the right and interest of Dugat in said suit was sold by the sheriff and adjudicated to T. J. Mayfield, for sixty-two dollars. On the second of May, 1831, Mayfield assigned and transferred it to H. Eastin, who was the defendant. Eastin now claimed to be the owner of the suit against himself, and let judgement go. Dugat sued out his execution, and Eastin enjoined it, on the ground that the judgement on which it issued was extinguished by confusion, he being both debtor and creditor.

The defendant in injunction filed his peremptory exception, refusing to answer to the merits. He states that admitting the allegations to be true, they are insufficient in law to sustain the injunction. That the claim to the suit transferred to Eastin by Mayfield ought to have been pleaded in the suit while it was pending, and before judgement. And not having set it up in defence on the trial, he cannot now avail himself of it by injunction. That judgement having gone against him, it is *res judicata*, and cannot be inquired into in this way. He prays for a dissolution of the injunction, with interest, costs, and damages.

The District Court gave judgement dissolving the injunction with ten per centum interest, and twenty per centum damages and costs. The plaintiff in injunction appealed.

Simon, for plaintiff.

Garland, for the defendant:

1. The injunction cannot be maintained, because at the time of the trial in the court below, the plaintiff in injunction had, from his own showing, all the means of defence that he now claims. He might have pleaded them in the original suit against him and prevented judgement; but not having done so, he cannot now make them the ground to sustain an injunction. 1 *Mar. N. S.* 71. 8 *Ibid.* 513.

2. The defendant must, in his answer, set forth all his grounds and means of defence, otherwise he cannot avail himself of them after judgement. *C. Pr.* 327.

3. The damages awarded on the dissolution of the injunction are not only authorized, but required by law. It is expressly provided, that in dissolving an injunction the court shall decree ten per centum per annum interest on the judgement enjoined, until paid, and twenty per centum damages, with more if claimed and proved. See *Acts of* 1831, *p.* 102, § 3.

MARTIN, J. delivered the opinion of the court.

The petitioner states, that during the pendency of a suit brought by Dugat against Eastin, a judgement creditor of the former, had his claim against Eastin, which was the object of the suit, sold under a *fieri facias*, and it was purchased by Mayfield, who sold it to Eastin. On the second of May last, and on the fourth of the same month, Eastin not having pleaded this purchase, Dugat recovered judgement against him, and soon after sued out an execution. On this, Eastin procured an injunction, alleging that the claim of Dugat, on which judgement had been obtained, had been extinguished by confusion, Eastin, who was the debtor, having since the purchase become the creditor of it. Dugat obtained the dissolution of the injunction, and Eastin appealed.

The appellee has contended, that the injunction was improperly dissolved, as at the time of the trial of the suit in which he obtained the judgement, the appellant was, from his own showing, possessed of the means, if they really existed, of preventing a judgement against himself, and therefore, could not afterwards resort to these means to prevent the execution of the judgement. 1 *Mar. N. S.* 71—8. *Ibid.* 513.

A defendant must set forth in his answer all his means of defence, otherwise he cannot avail himself of them afterwards. *C. Pr.* 327.

An injunction is a remedial writ and cannot be obtained unless the party applying for it shows he is without any other

remedy, and gives some different reason why he cannot be relieved otherwise. *Harrison's Chan. p.* 171.

It is a settled practice in those states of the Union where law and equity courts are separated, and in England, that a bill for an injunction will not be maintained in chancery, unless the party shows he could not defend himself at law. 1 *Hen. & Mun.* 453. 4 *Ibid.* 423. The *Code of Practice* and the *Acts of the Legislature* of 1826, *p.* 170, § 9, and 1828, *p.*150, § 2, prescribe the cases in which injunctions may issue, and the present is not one of them. The party might have amended his answer in the original suit, and have had the benefit of the plea of confusion, if it existed; and if he had pleaded any matter inconsistent with the general issue, it would have been a waiver of that plea only. Amendments are admissible at any stage of the cause previous to the trial, and will always be admitted when they promote its justice.

After the defendant has answered, if he becomes the owner of the claims on which suit is pending against him, he may amend his answer and plead confusion of claims; and if he had pleaded any other matter inconsistent with the general issue, it would have been a waiver of that plea only.

Amendments are admissible at any stage of the cause previous to trial, and will always be admitted when they promote justice.

The doctrine of *res judicata* is not applicable to the present case. The question is not whether the plaintiff has not lost the right of having the benefit of a defence he says he has, by not profiting it in time.

It is true that in the two cases cited from the new series, we held that an injunction could not be obtained to stay the execution of a judgement on the allegation of facts which might have been pleaded before it, and would have prevented its being rendered.

But if the defendant omits to plead confusion and lets judgement go, the doctrine of *res judicata* does not apply. He does not thereby lose the benefit of a defence by not profiting by it in time.

An examination of these cases will show they were decided on principles not applicable to the present.

Dessesart had obtained a judgement in the District Court against Lafon's executors. They obtained an injunction on the ground that the active debts of the testator left nothing for the payment of his legacies. The injunction was dissolved because relief was sought by an attempt to set aside the judgement, by preventing its execution, on the allegation that it had decided the legacy was to be recovered from the executors, while it ought to have decided that it was not, they having no funds of the estate applicable to the payment of legacies. We supported the judgement of dissolution, and

said that if the original judgement was correct, it ought to be executed; if not, it ought to be by one of the means pointed out by law, *i. e.* by an appeal or the action of nullity. 1 *Mar. N. S.* 71.

McMicken obtained judgement against Monroe and others, as sureties of a curator. Monroe obtained an injunction, on the ground that the curator had failed, but on the day of his failure the succession was indebted in a large sum to a firm of which the curator was a member, and that the sureties were then subrogated to the curator's claims against the succession, and that the dividend to which they were entitled, was more than sufficient to satisfy the judgement. There were some other grounds, but this was the prominent one. We again supported the judgement of dissolution, thinking that the time to have presented these matters of defence was before judgement. It is clear that in this, as in the former case, the party sought to avoid the judgement by preventing its execution, without a resort to any legal means pointed out by law to reverse or annul it. 8 *Ibid.* 513.

The present case is widely different from either of the above, in both of which the judgement was alleged to have allowed to the plaintiff what he was not entitled to receive.

In the present case, the facts presented show, that Dugat was the creditor of Eastin for the sum recovered. But that before judgement the claim had been seized and sold by a creditor of Dugat and finally had become the property of Eastin. After the sale of the claim, the purchaser of it might have intervened and prayed to be admitted as a plaintiff, or considering him as his transferree, suffered him to proceed to judgement. Eastin, had he not been the purchaser, might have pleaded the assignment, had divested the plaintiff of his interest, and if he had not formal notice of the assignment, and had wished to have the extent of his debt legally ascertained, considered Dugat as the trustee of the purchaser and suffered him to proceed to judgement.

If, afterwards, Dugat had sought to avail himself of the judgement to the injury of the purchaser, by suing out exe-

WESTERN DIS. Sept. 1832.

EASTIN vs. DUGAT.

cution, he might have been defeated, and his execution set aside, on the allegation and proof of the transfer. He could not have complained of an injunction like the plaintiffs in the preceding cases, as avoiding the judgement by preventing his reaping the benefit of it by other means than those pointed out by law; because the law authorizes a court to set aside an execution irregularly issued; and the transferor of a claim cannot regularly issue an execution on a judgement obtained thereon, even in his own name, to the injury of the transferree from whom he has received the price of the claim.

The defendant has two remedies, either to plead confusion of claims and prevent judgement, or if the plaintiff proceeds to judgement and sues out execution, it may be perpetually enjoined.

The real difference in these cases is that in the last the matter might be legally available both in preventing the judgement and in setting aside the execution after it was rendered. In the other two, it was available only by plea before judgement to prevent its being rendered, in neither can it avail to attack the judgement.

The circumstance of the purchaser of the claim at the sheriff's sale having transferred it to the debtor, if it can justify the original creditor to receive it twice, once by the satisfaction of his own debt by the price at the sale, and afterwards from the second purchaser.

In those of our sister states in which legal and equitable rights are acted on by different tribunals, the remedy sought in the present suit would be waived as a legal one. The party would have asked for a *supersedeas* to the execution and the setting aside of the execution, in the court which rendered the judgement.

It is true the party appears to have mistaken his remedy. He has spoken of the confusion of the debt and its consequent extinguishment, which ought previously to have been pleaded before judgement. But we have been in the habit of refusing to dissolve injunctions when the facts of the case show that on the dissolution the party will immediately be entitled to another on an application in another form.

An injunction will not be dissolved when the facts of the case show that on its dissolution the party will immediately be entitled to another on an application in another form.

We think the court erred in dissolving the injunction.

It is, therefore, ordered, that the judgement of the District Court be annulled, avoided, and reversed, the injunction

reinstated, the exception of the appellee overruled, and the case remanded for further proceedings, he paying costs in this court.

ANDRUS ET AL. *vs.* THE TREASURER OF THE STATE.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

The sureties of a sheriff acquire no lien or mortgage on his real property, in consequence of his surety bond, whether it be recorded or not.

The state had no privilege or mortgage on the property of its collecting officers during the years 1826–7; or from the adoption of the Louisiana Code in 1825, until the passage of the act of 1830.

Where the state suspends its execution against its debtor, and gives further time to collect and pay over the taxes for which the debtor is a defaulter, at the instance of the sureties, they cannot claim to be exonerated on the ground of prolongation of time to the principal debtor.

This suit commenced by injunction, obtained by the plaintiffs therein, to enjoin two executions issued by the state treasurer in September, 1828, against B. S. Haw, late sheriff of the parish of St. Landry, and the plaintiffs who are his sureties, for the state taxes due by said parish, for the years 1826–7.

The first execution issued against Haw alone, for the taxes due in 1826, for which year he gave no surety bond. The second execution is against Haw and his sureties, for the sum of seven thousand nine hundred and forty-eight dollars seventy-five cents, the amount of state taxes due for the year 1827. For this year, a bond was given with the plaintiffs as sureties.

WESTERN DIS. *Sept.* 1832.

ANDRUS ET AL. vs. THE TREASURER OF THE STATE.

The sheriff was proceeding according to his instructions, to levy the first execution on all the property of Haw, which, after satisfaction, the residue of the proceeds of said property was to be applied to the second execution, in which the plaintiffs were bound as sureties. The property was insufficient to pay both demands. The plaintiffs obtained an injunction, in order to restrain the sheriff from applying the proceeds of any of Haw's property to the first execution, until the second one should be fully satisfied; also setting up other grounds of defence against any liability for Haw.

They further stated, that the property seized, consisted of land and slaves; and by an act of the legislature, passed March 27th, 1813, the amount of taxes collected by any sheriff, has the effect of a lien on all his real estate and lands; and, also, of his sureties, from the date of the bond given. That for the year 1826, Haw gave no bond; consequently the state has no lien on his estate for the taxes of that year; so that the lien or privilege resulting from the bond of 1827, is first entitled to be satisfied, before the state can resort to its claim for the taxes of 1826; and that the sureties have a right to require the enforcement of this law, if they are held liable for Haw's defalcation of 1827.

Several matters were set out in the defence, denying that the sureties were liable under the bond; that it was never legally executed, accepted, or approved by the state, nor recorded; and that the state granted a prolongation of time to Haw, and neglected to issue execution for one year after the taxes of 1827 became due, by which the securities are wholly exonerated. They further state, that the treasurer had no right by law, to issue an execution for the taxes of 1826, as there was no bond given for that year; they pray that the proceeds of the property seized for the taxes of 1826, be applied to the payment of the tax of 1827; that the injunction be perpetuated, and they discharged from all liability, &c.

The legislature, on a petition presented to it by the plaintiffs in December, 1828, passed a law suspending the treasurer's execution for the taxes of 1827, and directing the

property of Haw, seized under the one for the taxes of 1826, to be sold on a credit of one and two years; and allowing one year more to the plaintiffs, as Haw's sureties, to collect and pay into the treasury the taxes of 1827.

This act was immediately protested by the sureties, as granting a prolongation of time to Haw, without their consent, and contrary to the prayer of their petition to the legislature. Parole evidence was received to show the law was enacted in pursuance of the plaintiffs' petition, the original being lost.

The evidence shewed the bond was not recorded for the year 1827, but that it was duly executed, and the sheriff took the oath under it.

The counsel for the state treasurer pleaded the general issue, and set out the various grounds of the liability of the sureties; and prayed for the dissolution of the injunction, and the sale and proceeds of Haw's property to be applied to the first execution, and that he be permitted to proceed on his execution against the sureties.

There was judgement dissolving the injunction, and the plaintiffs appealed.

Bowen and *Brownson*, for the plaintiffs in injunction.

Garland, for the treasurer of the state and defendant in injunction:

1. The sureties of Haw are bound for the taxes of 1827. They signed his bond for that year; and in whatever manner persons bind themselves, so they shall remain bound. 2 *Martin, N. S.* 672, 681. 3 *Martin*, 569. 5 *Ibid.* 194. 1 *Pothier, no.* 56.

2. The bond is in full force. It was accepted, as appears by the parish judge's certificate, who also states it was approved by the justices of the peace. The bond itself put an end to the question that Haw was not duly appointed sheriff; it expressly admits him to be. 3 *Martin, N. S.* 589. 12 *Wheaton*, 64. 2 *L. Rep.*

3. The recording the bond would have given no lien or mortgage, to which the sureties might be subrogated, for the

WESTERN DIS. Sept. 1832.

ANDRUS ET AL. vs. THE TREASURER OF THE STATE.

state had no mortgage on the property of its collectors; they were in no worse situation by its not being recorded. *L. Code*, 3280. 8 *Martin, N. S.* 243, 316.

4. The plaintiffs, as sureties of Haw, have no right to say, that the money, made under the executions issued by the treasurer, shall be applied to the payment of the taxes of 1827, instead of those of 1826. Haw himself not having imputed the amount to that year's taxes, they cannot claim the power of imputing the sums made as they please. *L. Code*, 2159, 2162.

5. The act of the legislature, passed in December, 1829, on the petition of the sureties, is not a prolongation of the term of payment accorded to Haw, the principal debtor, within the meaning of the code, and does not in any manner interfere with the rights and remedy which the sureties might have had against their principal. *L. Code*, 3032. *Acts of* 1829, *p.* 6.

6. The plaintiffs availed themselves of the benefit of that act, especially the fourth section, and proceeded under it to collect the taxes then unpaid, as will appear by the testimony of the person appointed to collect them.

Lewis, for plaintiffs, in reply:

1. The act of the legislature, suspending the executions against Haw, was passed without the consent of the sureties. It operated a prolongation of the term of payment of the taxes of 1827, which released the sureties.

2. Parole evidence was improperly received to prove the contents of the petition to the legislature, by the sureties, for relief; because the loss of the original was not legally accounted for.

MATHEWS, J.:

In this case the plaintiffs obtained an injunction to stay proceedings on an execution issued by the defendant against

them and one Haw, who acted as sheriff for the parish of St. Landry, and in his capacity as such, was bound to collect the taxes of the state, assessed in said parish for the year 1827; and for the faithful performance of his duties, the plaintiffs were his sureties. The injunction was dissolved by a decree of the court below, and they appealed.

The decision of the case is now reduced to a single question, and that is, whether the appellants are discharged from their liability to the state, in consequence of an act passed by the legislature, and approved on the fifth of December, 1828, by which the execution, issued against the sheriff and his sureties to enforce the payment of the taxes of 1827, was suspended.

It appears by the evidence of the case, that two executions were placed at the same time in the hands of the sheriff (successor in office of Haw), one for the taxes of 1826, and the other for the taxes of 1827. The state had no sureties of the sheriff to secure the payment of the taxes for the first year; in relation to those due, the plaintiffs were in no manner interested. Finding that their property was in danger of being sold under the execution of 1827, they made an application, by petition, to the legislature, to suspend that process. This petition is lost, and consequently it is impossible now to ascertain with precision what was prayed for.

The most important evidence adduced to establish the prayer of that instrument consists of a letter of L. Lesassier, addressed to John Moore, then a member of the legislature, and the testimony of the latter. Lesassier states explicitly, in his letter, that the object of the petition was to get a year for the collection of the taxes, and obtain time for the sale of the real property and slaves belonging to the sheriff, under the supposition that the sureties of Haw had some lien or tacit mortgage on the real estate of their principal, in consequence of the bond. I am of opinion that they had no such lien. The property of the sheriff being equally liable to be seized to pay the taxes of 1826, as those of 1827; and at that time the state itself had no privilege or lien on the property of its

The sureties of the sheriff acquire no lien or mortgage on his real property in consequence of his surety bond, whether it be recorded or not.

The state had no privilege or mortgage on the property of its collecting officers during the years 1826-7; or from the adoption of the

WESTERN DIS. *Sept.* 1832.

ANDRUS ET AL. *vs.* THE TREASURER OF THE STATE.

collecting officers. The petition of the sureties being lost, the whole requests contained in it cannot be known. It ought, however, to be presumed that they were reasonable, and such as had relation to the matters in which the petitioners were really interested. Their interest was involved in the collection of and payment of the taxes of 1827. In relation to those of 1826 they were not in any manner bound; consequently, could not justly interfere with the policy of the state, as to the means which the treasurer might be pursuing to effect the payment of the taxes of that year.

Lou. Code, in 1825, until the passage of the act of — 1830.

Moore, in his testimony, states, that the first and fourth sections of the act of the legislature conform to the request of the petitioners.

The law contains only four sections, and the two intermediate ones appear to me to relate to a subject in which the plaintiffs were very remotely, if at all interested. But these sections seem to conform to the views of the appellants, if we ascertain them from Lesassier's letter, which, in the absence of the petition, is certainly testimony in this regard not to be relied on. They wished Haw's real estate and slaves to be sold on a credit of one and two years, and these terms are granted by the act. The sales to be made under the execution for the taxes of 1826, and to be made by the sheriff.

It seems to me that it would have been very unreasonable in the plaintiffs to have asked the state to give up to them, as sureties for the taxes of 1827 (and for them alone), the property of the sheriff, seized to pay the taxes of the preceding year, for which the government had no security; and being unreasonable, I presume it was not requested.

Where the state suspends its execution against its debtor, and gives further time to collect and pay over the taxes for which the debtor is a defaulter, at the instance of the sureties, they cannot claim to be exonerated on the ground of prolongation of time to the principal debtor.

I conclude, from the facts of the case, as they appear to me, that the execution against Haw, the sheriff, was suspended at the instance of the appellants, and consequently, they have no right to invoke in their favor the benefit accorded by law to sureties, when a creditor extends the time of payment to the principal debtor.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be affirmed, with costs.

MARTIN, J.:

This cause was argued at the last term, while indisposition prevented my attendance. There was a division of opinion between the two judges who attended, on one question only, *i. e.* whether the sureties were discharged by the state ordering the suspension of the execution which the treasurer had issued against the principal debtor? And this is the only question on which the case turns.

I have read the opinion which the senior judge is about to deliver, and concur with him in every part of it.

I deem it, however, proper to add that in my opinion the act of the general assembly suspending the sale of the original debtor's property, was not an extension of the time of payment. It was only a forbearance to enforce payment by legal means, without any agreement on the part of the state, to use all these means, during any particular period.

The general assembly might have on the following day ordered, or the very day of the passage of the act, have repealed it, and the sureties by payment into the treasury could at any time have acquired the right of directing the execution to be proceeded on.

The suspension was during the pleasure of the state, and the sureties, by payment to the treasurer, could have at any time of right *ipso facto* been subrogated to all the rights of the state as to the means of enforcing payment. The suspension was during the pleasure of the creditor, *i. e.* the creditor for the time being. Payment would have made the sureties creditors for the time being, and they might, therefore, have put an end immediately to the suspension.

This suspension did not impair the rights to the subrogation of which payment would have entitled them. It did not place them in a worse situation or inflict an injury on them, and, therefore, did not discharge them.

I think the injunction ought to be dissolved.

WESTERN DIS. *Sept.* 1832.

ANDRUS ET AL. vs. THE TREASURER OF THE STATE.

PORTER, J.:

The plaintiffs were sureties of one Haw, who was sheriff of the parish of St. Landry, and they have enjoined an execution which the defendant issued against them as such, for the balance due by the principal to the state, in his official capacity.

In their original, supplemental and amended petition, they set out various grounds why they are not responsible for him. All these grounds, with the exception of one, I consider untenable; and the view I have taken of that one renders a particular notice of the others unnecessary.

They say they are discharged because the state extended the legal time for the payment of taxes, without their consent.

By an act of the legislature, passed the fifth of December, 1828, it is enacted, that the treasurer of the state be and is hereby directed to suspend the execution issued from his department against B. S. Haw and his sureties, for taxes by him collected as sheriff of the parish of St. Landry, for the year 1827; and a term of one year was given to the sureties to collect the state taxes for that year and pay them into the treasury. See *Acts of the Legislature*, 1829, *p.* 8.

The plaintiffs contend, this act extended the term of payment to the sheriff, and deprived them of immediate recourse on him, had they discharged the debt.

The state answers, the law had no such effect, and if it had, it was passed on their solicitation, and at their request.

If consent was given by the plaintiffs to the act, it precludes the necessity of inquiring into the question, whether the term of payment was prolonged.

The petition which the sureties presented to the state, has been lost; but parole evidence was received in the court below, to prove its contents.

That evidence consists of the testimony of two witnesses; one of them a member of the legislature, to whom it was enclosed for presentation, and another who saw it before it

was forwarded. There was also introduced a letter from one of the sureties, to the witness first mentioned.

To understand properly this testimony, and make a correct application of it, it is necessary to state, that at the time the sureties drew up their petition to the legislature, and sent it on, there had issued from the treasury department two executions against the sheriff; one for the taxes for 1826, and the other for those of 1829; both these executions had come into the hands of the proper officer the same hour of the same day. The plaintiffs were under the impression, that as the sheriff had not given bond for the taxes of the year 1826, no lien existed on his property for the defalcation of that year, and that one did exist for what he might owe for the year 1827; and they required the law to be so worded, as not to impair any rights which the taxes of 1827 might confer on them.

The second section of the act, however, which has been already referred to, directed the treasurer of the state to proceed and sell the property of the sheriff for the payment of the taxes of 1826. As soon as the sureties obtained a knowledge the statute was passed in this way, they went before a notary, and declared that it was not passed in conformity with their demand, and that they could not accept of its conditions in their favor, nor act under it.

The letter of the surety, enclosing the petition, among other things, says: "The securities contend that they have a preference on the land and slaves of Haw, by reason of the bond and its regular recording. The object of the securities is to get a year for the collection of these taxes, and obtain time for the sale of the real property and slaves. The law so worded, as not to impair any privilege or preference which the taxes of 1827 may have over those of 1826."

Moore, the member of the legislature to whom the petition was addressed, states that a law was drawn up pursuant to the sureties' request, but that the law as made, is not pursuant to their directions, and that he objected to it at the time. The 1st and 4th sections are conformable thereto, but the second section, that which directs the property of Haw

to be sold for the taxes of 1826, is not. They simply asked for time.

The other witness, Garland, thinks the petition was an application for time alone, and that they did not require a distribution of the funds which the sheriff might make on the executions in his hands.

The impression produced on my mind from this evidence, is, that the relief prayed for, was not granted as the sureties asked for it. They required that the property seized for the taxes of 1827, should be sold for their payment. It may be true, the act in no manner changed their legal rights; that a creditor who has levied on two executions, may impute the payment as he pleases; may suspend one and direct the other to proceed, and that the plaintiff had no mortgage on the land and slaves. But the question is not, whether they were correct or not in their understanding of their rights, but whether they assented to the delay given in another condition, but that which their view of these rights induced them to ask? I think they did not. They might have made their consent depend on the state's surrendering a part of its legal preferences. The application would have been absurd, but it is not less true, that unless their demand had been complied with, their assent would not have been given to an extension of time on any other conditions; and a prolongation of the term, says our law, granted to the principal debtor without the consent of the surety, operates a discharge of the latter. *La. Code*, 3032.

There is next to be examined, whether a law merely suspending the execution, was a prolongation of the term of payment. In the consideration of this question, I think little aid can be derived from an examination of the consequences which would result from a similar act on the part of an individual creditor; in regard to him, perhaps, the sureties would not be discharged; because by the mere act of suspension, he had done no act which he could not at any moment recal, and consequently, those bound with the debtor, on paying the creditor, could instantly have exercised the right which

he retained, and at once enforced their claims. But after the legislature adjourned, no officer of the government could issue execution; the right of recovery was suspended until another meeting of that body; the sureties by paying to the treasurer, could acquire a greater right than he had; and it is not seen how this act of the legislature, which prevented all means of enforcing the claim for the space of time which intervened between its sittings, can be distinguished from that of an ordinary creditor, who would tie up his hands by a prolongation of the term for the same space of time.

In relation to the consequence of giving time without the consent of the surety, I have considered the case precisely as if the state of Louisiana was an individual, for I understand her rights in matters of this kind, are neither greater or less. There is no single principle of a free constitutional government, which more challenges applause, or brings with it more advantages to the citizen, than that which makes society in its collective capacity, bound by those laws which it enacts for the direction of each individual composing it, and compels the sovereign power to be just from necessity, rather than from election.

I am, therefore, of opinion, the judgement of the court below should be reversed, and the injunction made perpetual.

WESTERN DIS. Sept. 1832.

BAKER vs. THOMAS ET AL.

BAKER vs. THOMAS ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

A title to land resulting from an order of survey granted in 1792, actual survey in 1802, and accompanied by proof of possession three or four years, will prevail over a title based on a prior order of survey granted in 1790, without being surveyed or ever taken into possession, both titles being confirmed by the same act of Congress.

According to *art.* 52, *p.* 484, of the *Old Civil Code*, and *art.* 3484 of the *Louisiana Code*, if a party instituted his suit after prescription began to run, it will interrupt and stop prescription up to that time, although the suit is brought before an incompetent jurisdiction, and is voluntarily or otherwise dismissed.

The new prescription under the *art.* 3485, of the *Louisiana Code*, by which it is declared that if the plaintiff, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened, can only operate in *futuro*, not having a retroactive effect.

The plaintiff claims four hundred arpens of land, on the island of Cote Blanch, in the parish of St. Mary, now in the possession of the defendants. He derives his title by regular mesne conveyances from the heirs of Abraham Roberts, deceased, who held the land in virtue of an order of survey granted by the Baron de Carondelet, the 18th of April, 1792. This title was accompanied by a plat of the survey made by Fr. Gonsoulin, dated April 18th, 1802. It contained ten arpens front, with the depth of forty, and called to adjoin the lands of Wm. Bell on one side, and by the royal domain on the other. The commissioners of land claims reported that no proof of occupancy accompanied this title, but in their opinion the claim was valid under the usages of the Spanish government, and ought to be confirmed. It was confirmed by act of Congress, approved April 29th, 1816.

The defendants, who are the heirs of James Thomas and Jett Thomas, of Georgia, claim title to the tract of land in controversy, in virtue of a Spanish grant, dated November 17th, 1790, in favor of one Louis G. Demaret, for thirty arpens front with the ordinary depth, on Cote Blanche island, and embracing the *locus in quo*. The defendants' ancestors derived title regularly by mesne conveyances from Demaret the grantee. There is no positive evidence of this grant having ever been occupied by the grantee or any one for him; yet the commissioners recommended the claim to Congress, which was also confirmed by act approved April 29, 1816, leaving the question of right between the conflicting claimants to be settled by the courts. These constitute the titles of plaintiff and defendants. The latter rely on the prescription of ten, twenty, and thirty years. The plaintiffs, however, allege prescription was interrupted. Robert Martin, the vendor of Baker, the present plaintiff, instituted suit in the Probate Court in the parish of St. Mary, the 24th July, 1824, and on the 17th of September, 1825, his attorney voluntarily dismissed it; Martin having by this time sold all his interest to the plaintiff.

When the suit was ready for trial, the curator of the vacant estate of one Peter Lee, filed his petition of intervention, claiming the premises in virtue of alleged grants made in 1791, to J. and W. and S. Bell, A. Roberts, and Louis G. Demaret, who it is averred cultivated the land before the year 1800, and about that time sold to Peter Lee. No chain of title was shown on the trial and the court and jury disregarded the claim.

The plaintiff had judgement in his favor quieting him in his title to the land. The defendants and interpleader appealed.

Lewis, for the plaintiff:

1. We show a better title to the land in controversy, accompanied by actual possession. Roberts under whom the

WESTERN DIS. Sept. 1832.

BAKER vs. THOMAS ET AL.

plaintiff claims, took possession of the land in 1792, cultivated it, and continued in possession until about the year 1800.

2. The prescription relied on by the defendants is interrupted by the institution of a suit by the vendor of the plaintiff before the claim was barred.

3. By the fact of instituting suit, prescription which had began to run, was interrupted; and although afterwards dismissed, it stopped the prescription up to the time it was discontinued. The suit was instituted under the old code and dismissed after the adoption of the new. *Old Civil Code*, 484, *art.* 52. *Partidas, vol.* 1, *p.* 390. 3 *Part. tit.* 29, *law* 29.

4. By the interruption of prescription the plaintiff's vendor acquired a vested right; and this whether the court had jurisdiction of the case or not. See *the same authorities.*

5. The provision of the Louisiana Code in relation to the effect of discontinuing a suit, can have no operation in this case, because the prescription was by the service of the citation absolutely destroyed, and could only recommence from the time of dismissal. See *the authorities cited*, and *Pothier on Prescription and Possession.*

Bowen, argued on behalf of the defendants.

McMillan, for intervenor:

1. Denied the right of the plaintiff and defendant to make admissions relative to each other as regards the mesne conveyances and *locus in quo*, when a third party is concerned.

2. Lee's right was acquired under the old Spanish law, and it is sufficiently proven. 11 *Mar.* 207. 7 *Mar. N. S.* 314. 3 *Lou. Rep.* 104.

3. Lee claims under a grant to several of the Bells, went into possession in 1799, and continued more than ten years. The claim was confirmed on settlement and cultivation. He was found in possession as owner, and is to be considered as such until a better title is shown. *C. Code, p.* 482, *art.* 32—9.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiff claims title to a tract of land situated in the island of Cote Blanche. The cause was submitted to a jury in the court below, who found a verdict in his favor against the claims of the defendants and intervenor, and judgement being rendered thereon, these parties took appeals.

The titles set up on the part of the intervening party to the *locus in quo*, appears to us to be wholly unsupported by legal evidence; and as to this claim there can exist no doubt of the correctness of the verdict and judgement of the District Court.

The plaintiff claims the land in dispute in virtue of a title conceded to one Abraham Roberts, by the Spanish government, in the year 1792. The evidences in support of this title, are an order of survey of that date, and actual survey in 1802, and proof of possession by the grantee during three or four years. The *locus in quo* as between the plaintiff and defendants is admitted; and also, the genuineness and validity of all the mesne conveyances from the grantee down to said plaintiff. This title was reported favorably on by the land commissioners of the United States, and confirmed by an act of Congress, passed on the 29th of April, 1816.

A title to land resulting from an order of survey granted in 1792, actual survey in 1802, and accompanied by proof of possession three or four years, will prevail over a title based on a prior order of survey granted in 1790, without being surveyed or ever taken into possession, both titles being confirmed by the same act of Congress.

The title set up by the defendants is an order of survey accorded to one Dumaret in the year 1790, under whom they hold. It does not appear that the land conceded was surveyed, or that the grantee ever took possession of it. This claim was confirmed by the same act of Congress.

The simple statement of these facts shows clearly that the plaintiff has shown the best title to the property in dispute, according to principles recognised by this court in the case of *Gonsoulin's heirs* vs. *Brashears*. 5 *Mar. N. S.* 33. In that case a preference was accorded to a later order of survey, accompanied by actual settlement, over one older, when the land was never occupied by the claimant. But in the present case, the defendants rely greatly on their pleas of prescription, particularly that of ten years. And, according to the testi-

According to *art.* 52, *p.* 484, of the *Old Civil Code*, and *art.* 3484 of the *L. Code*, if a party instituted his suit after prescription began to run, it will interrupt

WESTERN DIS. *Sept.* 1832.

BAKER *vs.* THOMAS ET AL.

mony, it would prevail, unless the interruption alleged by the plaintiff, is to be supported.

The interruption alleged was made by the institution of a suit, in which the disputed premises were claimed by one of the immediate owners between the grantee and the plaintiff. It was commenced under the Old Civil Code, and by the provisions of law then in force, did, *ipso facto*, interrupt prescription from the date of the citation. And this interruption took place, although suit was commenced in an incompetent tribunal. See *Old Civil Code*, *p.* 484, *art.* 52. The suit alluded to was brought in the Court of Probates for the parish of St. Mary, and was dismissed by the plaintiff in that action after the promulgation of the Louisiana Code. The article 3484 of this work, is precisely like the article 52 of the old code cited. But the new code contains additional provisions, found in the article 3485, by which it is declared that if the plaintiff after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened. This being new legislation on the same subject, (in conformity with general principles on the subject of interpretation of laws) could only operate *in futuro*, as they ought not to be allowed a retroactive effect. The counsel for the defendants, however, contends that the article 3485, is solely remedial in its effects, and may, therefore, be retrospective in its operation. The distinction as to laws merely remedial, and those which affect the rights of persons, is often difficult to be ascertained, as the shades between rights and remedies, in a legal point of view, frequently run much into each other.

Perhaps it cannot be said, strictly speaking, that the person who brought the suit in the Court of Probates, acquired thereby any additional right to the property which he sued for. But he clearly, by this act, prevented the loss of rights which he already had, for by the service of the citation the prescription which had already began to interfere with these rights, was interrupted; and once interrupted to the previous time, could never after be computed to acquire a right by prescription. It was an act which had produced its legal

and stop prescription up to to that time, although the suit is brought before an incompetent jurisdiction and is voluntarily or otherwise dismissed.

The new prescription under the *article* 3485 of the *L. Code*, by which it is declared that if the plaintiff, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened, can only operate in *futuro*, not having a retroactive effect.

effect, which no legislative power could afterwards justly annul. We are, therefore, of opinion that the means of defence based on prescription cannot avail the defendants.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be affirmed, with costs.

DE BLANC *vs.* DE BLANC.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARTIN.

A judgement obtained by the wife against her husband on his confession, although conclusive between themselves, is liable to be impeached on the ground of fraud and collusion by third persons, against whom it may operate.

So in a suit by the wife (founded on a previous judgement against her husband), to recover property alleged to be subject to her legal mortgage, and claimed by a third person or creditor of the husband, on an allegation of fraud and collusion, the burthen of proof will be thrown on the plaintiff, to show the truth and genuineness of the claim on which she obtained the judgement against her husband.

Marguerite C. De Blanc obtained a judgement of separation of property, for the sum of five thousand eight hundred and nineteen dollars against her husband in 1815. She was able to satisfy all but one thousand and eighty-six dollars out of the property her husband then possessed. Subsequently, he inherited property as heir of his father, on which the petitioner claims to have an older and higher privilege for the balance of her judgment against her husband, it being for dotal and paraphernal property. Auguste Borine, a creditor of the husband, levied his execution on this property, for a debt of four hundred and fifty-nine dollars and eighty-seven

WESTERN DIS. Sept. 1832.

DE BLANC vs. DE BLANC.

cents, contracted in 1822, since the rendition of the wife's judgement. She now sues to enjoin this creditor from proceeding against the property of her husband, until her judgement is entirely satisfied, and cites her husband to show cause why her said judgement should not be carried into execution, &c.

The defendant, Borine, opposed her claim, alleging the judgement against her husband, to be obtained through fraud and collusion between them, with a view of cheating and defrauding his creditors; that the plaintiff could not avail herself of any judgement she may have obtained against her husband, to support a claim arising out of a balance due on it, in a suit against a third person, or one who was no party to it.

The defendant, De Blanc, died during the pendency of this suit, and it was transferred to the Court of Probates in 1827. The defendant, Borine, amended his answer in opposition to the plaintiff's claim, and added the wife's judgement against her husband, was a nullity, and could have no legal effect against his succession, now administered as a vacant estate; that defendant's judgement against De Blanc, was recorded in 1824, and operated as a general mortgage on the succession; that the wife's judgement never was recorded; she set up her legal mortgage for the restoration of all her paraphernal effects. The defendant insists that his mortgage is superior to the plaintiffs, and that his claim be first satisfied.

There was judgement perpetuating the plaintiff's injunction, and ordering her claim to be paid in preference to defendant's. The latter appealed.

The record of the suit of the wife against her husband in 1815, was offered in evidence in support of her claim.

It was admitted that the father of Joseph De Blanc died in 1826, and that the property in contest, was inherited at his death, and consequently came into Joseph De Blanc's possession, after the defendant, Borine's judgement, was obtained against him and recorded.

The parish judge's certificate states there is no document in his office, showing that Marguerite C. De Blanc brought

any property or money into marriage, or during marriage with her husband.

Brownson, for plaintiff.

Simon, for defendant, contended:

1. That the wife must against creditors produce proof other than the husband's confession in the marriage contract. 7 *Mar. N. S.* 460.

2. Subsequent creditors are not affected by the husband's confession, and other proof must be produced against them.

3. Where the answer charges the judgement to have been obtained through fraud and collusion, the wife must give evidence to prove it was *bona fide*. The judgement rendered on confession of the husband, is not sufficient. 8 *Mar. N. S.* 459.

4. In this case, the fraud and collusion is specially alleged, but at all events, I cannot see why a judgement rendered on the confession of the husband (certainly valid between them but not as to creditors), should have more force than the husband's confession in the marriage contract, or in any other public act subsequent to the marriage. If such judgement is to have effect against creditors, it will be promoting indirectly, what cannot be done directly.

5. There is no evidence that this judgement was ever published according to the *Civil Code, art.* 89, *p.* 342.

MATHEWS, J., delivered the opinion of the court.

The wife obtained a decree of separation of property from her husband, and a judgement against him for five thousand eight hundred and nineteen dollars, in the year 1815, which was satisfied, except one thousand and eighty-six dollars. The husband obtained the benefit of our insolvent laws, in the year 1824, and died on the seventh of December, 1826; having previously inherited from his father a certain amount

WESTERN DIS. Sept. 1832.

DE BLANC vs. DE BLANC.

of property, who died on the sixth of April, of the same year. Previous to the death of Joseph De Blanc, Auguste Borine (who is a defendant in this action) had obtained a judgement against him, and subsequently levied an execution on that part of his father's succession which was inherited by the son. The wife obtained an injunction to stay proceedings under this execution; claiming a preference on the property seized, to have the balance of her judgement satisfied. Pending these proceedings, De Blanc, the husband, died, and the cause was transferred to the Court of Probates, and judgement then rendered, allowing the preference claimed by the wife, from which Borine appealed.

A judgement obtained by the wife against her husband on his confession, although conclusive between themselves, is liable to be impeached, on the ground of fraud and collusion, by third persons against whom it may operate.

So, in a suit by the wife (founded on a previous judgment against her husband), to recover property alleged to be subject to her legal mortgage, and claimed by a third person or creditor of the husband, on an allegation of fraud and collusion, the burthen of proof will be thrown on the plaintiff, to show the truth and genuineness of the claim on which

The only question presented for decision relates to the preference claimed by the plaintiff, in consequence of her judgement against her husband. This judgement is based entirely on the confession of the latter; and the preference claimed is opposed on the ground of fraud and collusion between the husband and wife, by which the latter obtained judgement; and although conclusive between the parties, it is liable to impeachment by third persons, against whose rights it may operate. In truth, this question seems to be settled by several decisions of the Supreme Court. In the cases of *Buison* vs. *Thompson*, 7 *Martin*, *N. S.* 460, and that of *Beard* vs. *Pijeau*, 8 *Martin*, *N. S.* 459; and also that of *Serapurn* vs. *La Croix*, 1 *L. Rep.* 373. The doctrines laid down in these cases is in no manner contrary to the principles assumed in the decision of the case of *Turnbull* vs. *Davis et al.* 1 *Martin N. S.;* for in that suit no allegation of fraud and collusion is made in the answer.

The right of third persons who may be defrauded by judgements rendered in cases to which they were not and could not become parties, to allege fraud against such judgements, may be safely admitted as a general rule in jurisprudence; and all transactions between husband and wife, by which preferences are created in favor of one of the parties, must be viewed with suspicion when they come in competition with the claims of other creditors. We are of opinion that

the allegations of fraud and collusion, contained in the answer, placed the burthen of proof on the plaintiff, to show the truth and genuinenes of the foundation on which she obtained the judgement against her husband.

she obtained the judgement against her husband.

The judgement of the Probate Court must therefore be reversed. But the plaintiff having relied solely on her judgement, under a belief that it should be held conclusive against all persons, may have her just claims sacrificed. The cause ought therefore to be remanded, for a trial *de novo*, in order that she may adduce evidence (if in her power) to support the judgement against her husband; this the justice of the case requires.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the court below be avoided, reversed, and annulled: and it is further ordered, that the cause be sent back to said court for a new trial; the appellee to pay the costs of appeal.

FUSELIER (F. M. C.) *vs.* MASSE ET AL. (F. P. C.)

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

An instrument passed before a Spanish commandant, in the form of a notarial act, purporting to be an act of adoption, is insufficient to confer all the rights and privileges, under the Spanish laws, on the adopted child.

Adoption, by the Spanish laws, could only take place by the authority of the king; or by a judicial decree, rendered on a petition presented to the judge.

It is only in acts which cannot subsist but by the validity of all their parts, that the nullity of one portion draws with it the nullity of the whole.

WESTERN DIS. *Sept.* 1832.

FUSILIER vs. MASSE ET AL.

But though an act of adoption be invalid, as such, yet the donation contained in it, by making the child the universal heir of the donors to their property after death, gives the donee capacity to receive, independent of the adoption.

An acceptance is not required by the Spanish laws, to give effect to a donation, *mortis causa;* and in donations *inter vivos*, it was only required to deprive the donor of the power of revocation, when delivery did not accompany the gift.

Subsequent changes of disposition of property, in a will which is invalid, show a sufficient intention of a change of mind, as will revoke a former donation.

The plaintiff claims the succession of one Magdelaine Masse, deceased, on the ground that he was the adopted son of her and her late husband, Etienne Sem Fusilier, both f. p. c. He shows that he was purchased, as a slave, from A. Solieau, by the said Magdelaine and Etienne Sem, and emancipated by them in a public act, passed in 1797, before Martin Duralde, commandant of Attakapas and Opelousas, in which he was acknowledged as the natural son of Etienne Sem; and by a subsequent notarial act, passed before the same authority, in June, 1799, he was duly adopted by them, as their child and heir. He now claims their property in the same right as if he had been a child born of their lawful marriage. As such heir he claims the tract of land and improvements, whereon the said Magdelaine lived at her death, which the defendants withhold, and also the balance of the succession. He prays to be recognized as the sole heir of the deceased, and to be put in possession of all her estate.

The defendants, Rosalie, Jean François, together with Annette Masse, allege, that they are the brothers and sisters of Magdelaine Masse, deceased, and as such collateral heirs, are entitled to her succession, in preference to the plaintiff. They say the acts of 1798 and 1799, by which the plaintiff claims to be emancipated and adopted by Etienne Sem and Magdelaine, are null, because the plaintiff was a slave before passing them, and could not be legally adopted, &c. That

the said acts were made on condition that the plaintiff should assist the said Etienne Sem and Magdelaine, and not abandon them to the end of their lives, but which they say he has done. That in consequence, said Magdelaine in her will (which was annulled for want of the requisite formalities), revoked the previous act adopting him as her son, and bequeathed her property to the other heirs, except a legacy to the plaintiff, which he accepted and received from the executor of said will.

The defendants had judgement for the whole of the succession claimed by the plaintiff, who is inhibited from setting up any title to the same against the defendants. The plaintiff appealed.

It appeared in evidence, that the plaintiff was the natural and adopted son of Etienne Sam, and that the latter died without ever revoking the act of adoption. The wife was the survivor of them, who kept possession of all the property until her death. She left a will, bequeathing the estate to her collateral heirs, except a small legacy bequeathed to the plaintiff. This will was declared invalid for want of the requisite formalities. The plaintiff then sued for the whole of the estate.

PORTER, J., delivered the opinion of the court.

In the year 1782, two people of color, Etienne Sam and Jeannette, entered into a contract of marriage before the commandant of Attakapas and Opelousas; and by the same act agreed, that in case there were no issue of the marriage, the survivor should take all the property, whether proper or acquired, that existed at the termination of the coverture.

There were no children from the connexion; but the husband had a natural son, who was a slave of one Soileau. In May, 1797, Soileau promised to sell this slave to the husband, on the condition that he was to give him his freedom; whether any regular sale took place in pursuance of this promise, the record does not inform us; but in the month of

WESTERN DIS. Sept. 1832.

FUSILIER vs. MASSE ET AL.

August following, we find the father, by public act, emancipates his son, in conformity to the promise he had made to his former master, when the latter made the sale to him; the slave so emancipated, is the plaintiff in the present action, and he claims all the property the father and wife died possessed of, in virtue of an authentic act, by which they adopted him as their child.

An instrument passed before a Spanish commandant, in the form of a notarial act, purporting to be an act of adoption, is insufficient to confer all the rights and privileges under the Spanish laws, on the adopted child.

This act appears to have been executed before the commandant of Opelousas on the first day of June, 1799. The parties declare, that not having children by their marriage, they are desirous of nominating an universal heir to their estate; that for this purpose, they adopt the father's natural son, Pierre, with all the rights which that quality can confer on him; and that they institute him their only and universal heir after their death, of all their present and future property; only requiring in return, that he will assist them and not abandon them for the remainder of their lives. Two other clauses are contained in this instrument; one, by which the wife is stated to have declared on oath, that she executed the act without restraint, and of her own free will and accord; the other, by which it was agreed that it should not be annulled, except by the mutual consent of both husband and wife.

The husband died first, without any act of revocation; the wife, before her decease, executed her last will and testament, by which other dispositions were made of the property, although, by this will, a considerable portion of her estate was bequeathed to the plaintiff. A contest arose between the heirs of the wife and the plaintiff, in relation to the validity of this instrument; the latter endeavored to maintain it, but by a judgement of this court, it was pronounced null, for want of the formalities which the law required.

The plaintiff has, since the decision of that suit, instituted this action, by which he claims the whole of the estate, of which his adopsed mother died possessed. The answer asserts the defendants to be the legal heirs of the deceased, who died intestate; that the act of adoption was not made

pursuant to the laws of Spain then in force in Louisiana, and could confer no right on the plaintiff; that it was made on conditions which the plaintiff failed to perform; and, finally, that this act of adoption was revoked by an instrument, executed by the deceased, which though not good as a last will and testament, was valid as an act of revocation.

Adoption by the Spanish laws could only take place by the authority of the king, or by a judicial decree rendered on a petition presented to the judge.

By the laws of Spain, adoption could take place but in two modes; one by authority of the king, and the other by authority of justice, on petition presented to the judge, proof administered of the facts on which the law permitted the act, and a judicial decree rendered on the evidence given. In the present case none of these formalities appear to have been pursued. The instrument was passed before the commandant in the form of a notarial act. The maxim *omne rite acta* has been pressed into the cause of the plaintiff, but the maxim has its limits, and we cannot presume both a decree and the formalities which should have preceded it. *Febrero, p.* 1, *cap.* 15, § 1, *nos.* 1, 6, 33—5.

We are, therefore, of opinion, that the instrument produced in this cause, did not constitute the plaintiff the adopted son of the parties whose intention was to make him such. The next question is, whether the donation contained in it falls, as a consequence of the act of adoption being invalid.

As the donors had no forced heirs at the time the donation was made, and died without any, the donee had the capacity to receive, independent of the adoption. We, therefore, think that part of the instrument by which they gave him their property after their death, was valid and should take effect. It is only in acts which cannot subsist but by the validity of all its parts, that the nullity of one portion draws with it the nullity of the whole. Acceptance we do not think was required by the Spanish law, to give the donation *mortis causa* effect. In donations *inter vivos*, it was only required to deprive the donor of the power of revocation where delivery did not follow the gift. See the case of *Pierce* vs. *Gray et al.* 5 *Mar.* 367, and *note of Gregoria Lopez to the* 4*th law of the* 4*th title of the* 5 *Partida.* And *Siguenza, lib.* 1, *cap.* 25, *no.* 4.

It is only in acts which cannot subsist but by the validity of all their parts that the nullity of one portion draws with it the nullity of the whole.

We have next to examine whether this donation could be revoked, and if our inquiry should lead us to the conclusion that it could, whether in fact it was revoked.

By the Spanish law as by that of all other countries with which we are acquainted, donations *mortis causa* were subject to any change which the will of the donor might direct up to the time of his decease. The law of that country, however, presented an exception to the general rule in case the instrument contained a clause in a particular form. That form it is unnecessary to set out. It is sufficient to state that it required the donor to declare that for no cause whatever should the donation be annulled, and that it was to have the same force and effect as a donation *inter vivos*. The oath of the party was also necessary to make it binding on him. We are of opinion that the clause found in the act produced in this case, by which the donors made their power of revocation depend on the will of each other, did not take the case out of the general rule, and was not a compliance with the law which required a renunciation of a totally different kind. In coming to this conclusion, we have not taken into consideration the absence of the oath which the Spanish law required to make the contract binding. See *Siguenza, lib.* 1, *cap.* 25, *no.* 1—3. *Febrero, p.* 1, *cap.* 5, § 2, *no.* 42.

The next and last inquiry is, was the donation in fact revoked? As to the father, the case is quite clear; he died without making any change in it. His wife, the other donor, before her decease made her last will and testament by which she made dispositions of her property different with and contrary to those contained in the act of donation. This instrument was set aside at the suit of the heirs of the wife, as wanting in some of the formalities required by law to give effect to dispositions of property by an act *mortis causa*. But it is contended that though not good as a last will and testament, it is valid as a revocation. To this it is answered that had the instrument contained an express revocation, the doctrine contended for might be true, but that it is incorrect, when the change of will is implied from a testamentary

But though an act of adoption be invalid as such, yet the donation contained in it by making the child the universal heir of the donors to their property after death, gives the donee capacity to receive independent of the adoption.

disposition which failed in its effect, the presumption of law being that the testator only intended the donation should be revoked in case the provisions in the will could have their effect. Febrero states that three witnesses are sufficient to prove the change of intention, because the donation is revoked by the mere fact of the donor having repented of his former act. This question, however, is treated of by Toullier at great length and with his accustomed learning and ability. In opposition to Merlin he concludes, and in that conclusion we agree with him, that dispositions in a last will and testament, invalid as such, which are irreconcilable with and contrary to a previous donation, equally mark a change of intention in the donor as an express revocation and do revoke it. *Febrero, p.* 1, *cap.* 5, § 2, *no.* 41. *Toullier, lib.* 3, *tit.* 2, *cap.* 5, *nos.* 625—36.

An acceptance is not required by the Spanish laws to give effect to a donation *mortis causa*. And in donations *inter vivos*, it was only required to deprive the donor of the power of revocation when delivery did not accompany the gift.

It was attempted to show that the donation was made on certain conditions, and that the donee had performed them. The evidence in our opinion leaves this fact quite doubtful, and the plaintiff having the affirmative and failing to establish it, can derive no benefit from this clause in the act.

Subsequent changes of disposition of property in a will which is invalid, show a sufficient intention of a change of mind as to revoke a former donation.

The donation made by the husband and wife to the plaintiff, having revoked the clause in the marriage contract by which the survivor was to have the whole of the property at the death of one of them, it follows, from the opinion just expressed, that the donee of the husband by whom the donation was not revoked, must receive one half of the estate, and the heirs of the wife the other half.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed, that the plaintiff is entitled to one half of the estate real and personal, of which Magdelaine Masse died possessed, and the defendants in this cause to the other half; and it is further ordered, adjudged, and decreed, that this cause be remanded to the District Court, in order that a partition be made of

WESTERN DIS. Sept. 1832.

SINGLETON vs. SMITH.

said estate pursuant to this decree; the appellees paying costs in both courts.

Simon and *Brownson*, for the plaintiff.

Bowen, for the defendants.

SINGLETON *vs.* SMITH.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

It is not sufficient ground to dismiss an appeal, because the bond is signed by another person for the appellant, as attorney in fact, without producing his authority. The appellant is bound by law to comply with the judgement of the court, and the surety furnishes to the appellee all the security he can require.

An exception to the form of action will be considered as waived, by filing an answer to the merits.

Where a receipt is given by the agent of the plaintiff in execution for a certain sum, "in full of the within execution," parole evidence will be received to show there is error in the written receipt, and that it was only intended to be given in full for all the money then made on the execution.

When two written documents, each equally entitled to credit, are apparently inconsistent with each other, they may be explained and reconciled by evidence, *dehors* the instrument.

The plaintiff sues for the recovery of four hundred and sixteen dollars and fifty-eight cents, the balance of a judgement on a note of the defendants, obtained in the parish of

Rapides, about the first of April, 1827. He alleges the defendant is a citizen of Texas, and is about to remove his property out of the state; and prays for an attachment and judgement, &c.

The defendant first excepted to the action, that it was founded on a judgement rendered in another parish of this state, for a sum of money, upon which execution should have issued; and, further, that said judgement forms *res judicata* to this suit. He then plead a general denial, and satisfaction of the former judgement.

On the trial of the cause, the plaintiff offered the testimony of W. Singleton and W. Turnbull, (the latter sheriff of Rapides,) to show that the following receipt, contained in the former record and judgement obtained in Rapides, was not given in full for the execution and satisfaction of said judgement, as on its face it purports to be; but only in full of a certain sum then actually made on the said execution, by a previous sale of a negro girl; leaving the balance now claimed, as still unpaid. That the receipt was made to appear in full on its face, and signed by the plaintiff's agent through error. The defendant's counsel objected to the testimony, which was sustained by the judge presiding, and the plaintiff took his bill of exceptions:

"Received, Alexandria, 9th May, 1828, of Walter Turnbull, sheriff of the parish of Rapides, one hundred and twenty dollars, in full of the within execution.

"WASHINGTON SINGLETON."

There was judgement for the defendant; the plaintiff appealed.

Splane, of counsel for defendant and appellee, moved to dismiss the appeal on the ground, that the appeal bond was insufficient, being signed by an atterney in fact for the principal, who did not show any authority to perform such an act. Cited *La. Code*, 2956.

No counsel appearing for the plaintiff, *Splane*, for defendant, submitted the following points and authorities:

WESTERN DIS. *Sept.* 1832.

SINGLETON *vs.* SMITH.

1. A record or receipt contained in and making part of it, cannot be contradicted by parole testimony. 4 *Mar. N. S.* 176. 7 *Mar. N. S.* 231. *La. Code*, 2256. 3 *Starkie*, 995, 1001—4.

2. The return of a sheriff to a writ of execution, is conclusive between the parties litigant. 3 *Starkie*, 1044, (*in Margin* 11 *East* 296,) 1 *ibid*, 284. 1 *N. H. Rep.* 68.

3. A receipt to an agent, acknowledging payment by the principal or plaintiff in execution, is conclusive, and cannot be contradicted by parole evidence. 3 *Starkie*, 1276. 6 *Sergt. & Rawle*, 146. 1 *Johns.* 70.

4. In this case, the defendant is the principal or plaintiff in the original execution in the record; and the sheriff the agent or person authorized to receive and pay over the money.

PORTER, J., delivered the opinion of the court.

It is not sufficient ground to dismiss an appeal, because the bond is signed by another person for the appellant, as attorney in fact, without producing his authority. The appellant is bound by law, to comply with the judgement of the court, and the surety furnishes to the appellee, all the security he can require.

The appellee has moved to dismiss this appeal, because it does not appear the bond was signed by an attorney in fact, legally empowered to execute such an instrument for the appellant. It is unnecessary to go into this inquiry, as the appellant is bound by the law, to carry into effect any judgement the court may render; and the surety who signed the appeal bond, furnishes to the appellee all the security he can require.

An exception to the form of action, will be considered as waived, by filing an answer to the merits.

The suit is brought on a judgement rendered in the sixth district; and an exception was filed to the right of the plaintiff, to maintain two actions within the state for the same cause. Whether this exception was not well taken, cannot be inquired into, as it does not appear to have been passed on by the court below; and the defendant waived it by filing an answer, in which the merits were put in issue.

The record on which suit is brought, exhibited the following return by the sheriff of Rapides, on an execution which had issued there.

"By virtue of this writ of *fieri facias*, issued in this case, I seized a negro woman, named Dice, aged about twenty-seven

years, and having offered the same at public sale, &c. J. Young became the purchaser, for the price of three hundred and thirty-three dollars, it being more than two-thirds of the appraised value."

Below the return, is found the following receipt:

"Received, Alexandria, 9th May, 1828, of Walter Turnbull, sheriff of the parish of Rapides, one hundred and twenty dollars, in full of the within execution."

The judgement which the *fieri facias* pursued, was for a larger amount than that made by the sheriff; and the receipt expresses to be in full of the execution. On the trial, the plaintiff offered evidence to show there was error in the terms used in the acquittance given by him; that he had in fact only received the money collected; and that instead of being in full of the amount ordered to be made by the execution, he contemplated giving a receipt in full to the sheriff, for all the money he had made on the execution. This evidence the defendant opposed, on the ground that it was offering parole evidence to contradict the written proof on record; and the court sustaining the allegation, the plaintiff took a bill of exceptions.

Where a receipt is given by the agent of the plaintiff in execution, for a certain sum, "in full of the within execution," parole evidence will be received to show there is error in the written receipt, and that it was only intended to be given in full for all the money then made on the execution.

When two written documents, each equally entitled to credit, are apparently inconsistent with each other, they may be explained and reconciled by evidence, *dehors* the instrument.

We are of opinion the judge erred. Did the receipt stand alone, the question would be presented under another aspect; but taken with the sheriff's return, it does not involve the right of a party to control written proof by parole testimony; but whether two written documents, each equally entitled to credit, and apparently inconsistent with each other, may not be explained and reconciled by evidence, *dehors* the instrument. The sheriff's return is not attacked; there is no allegation that it is incorrect. By it, we see that only a certain sum, less than the judgement, interest, and costs, was received by him. Now, unless we admitted the sheriff paid over to the plaintiff more money than he received, the receipt can be understood in no other way, than in full for all the moneys made by him. We think the apparent contradiction

WESTERN DIS. Sept. 1832.

LINTON vs. MOORE.

in the two documents, justified the introduction of parole evidence.

And it is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be reversed and annulled, and that the cause be remanded to the said court, with directions to the judge thereof, not to reject evidence that the money received by the plaintiff, were not in full of the amount ordered to be made by the execution; and it is further ordered, that the appellee pay the costs of the appeal.

LINTON *vs.* MOORE.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. LANDRY.

The appellee must allege the injury done him by the judgement, and pray that it be amended, in his answer, or he will not be relieved on the appeal.

The law allows remuneration for the counsel of absent heirs for services rendered, but no compensation for the loss of the opportunity of being employed against the estate claimed by the heirs he represents.

The plaintiff having been appointed, in November last, attorney for an absent heir to the estate of R. Taylor, deceased, filed his petition last May term of the court, against the administrator, demanding three hundred and one dollars, as a compensation for his services; alleging that the law deprived him of the power to represent claims and appear against the heirs of the succession, in consequence of said appointment. He prays that the administrator be condemned to pay him the above sum, &c.

The defendant denied that any services had been rendered, or that any compensation was due to the plaintiff. The judge allowed the legal fee of eleven dollars, and gave judgement for the plaintiff accordingly. The latter appealed.

It was admitted the plaintiff had been regularly appointed, on his own application, in November last; that there were four heirs to the decedent's estate, and the inventory amounted to about ten thousand dollars. It was agreed the papers of the succession, on file in the parish judge's office, might be referred to, as evidence in this cause. They do not show that any services whatever were rendered by the attorney of the absent heir; from them it appears the inventory was taken before the appointment.

Linton, in propria persona, submitted the case on the part of the plaintiff.

Curry, for defendant, submitted the following points:

1. "The counsel of absent heirs are only entitled to receive fees and emoluments proportioned to the pains taken in the performance of their duties," &c.; which are "not to be granted to them except on proof being made of the services by them rendered." *L. Code, art.* 1213.

2. There is no proof that any services were rendered in this case, other than the appointment of the plaintiff; that there were a certain number of heirs, and the amount of the inventory stated.

3. The plaintiff was appointed in November, 1831, after the inventory was made; and filed this suit in May last, before the administration was closed or settled, or the tableau of distribution homologated; consequently, his action is premature, and should be dismissed.

MARTIN, J., delivered the opinion of the court.

The plaintiff having been appointed to represent an absent heir of a person whose estate was administered by the defen-

dant, stated the estate was much involved, and a long time would be required for its settlement; and in as much as his appointment deprived him of the faculty of being employed against the estate, he claimed three hundred and one dollars, as a remuneration for his services. The defendant pleaded the general issue. The plaintiff had judgement for eleven dollars, and appealed.

The statement of facts admits the plaintiff's appointment; states the amount of the inventory to be ten thousand four hundred and sixty-six dollars and sixty-six cents.

The defendant's counsel has contended, that the counsel of an absent heir is entitled only to emoluments and fees proportioned to the pains taken in the performance of his duties, and they are not to be allowed but on proof of the services rendered, and of the value thereof. *L. Code*, 1213. And in the present case there is no proof of any service: that the plaintiff was appointed in November, 1831, after the inventory was filed, and instituted the present suit in May following, and before the administration was closed and settled, and a tableau of distribution; consequently, the suit is premature and ought to be dismissed.

The appellee must allege the injury done him by the judgement, and pray that it be amended, in his answer, or he will not be relieved on the appeal.

As the appellee has not alleged any injury done him by the judgement, and prayed that it may be amended, in his answer, we cannot relieve him from the payment of the sum awarded to the appellant.

The law allows remuneration for the counsel of absent heirs, for services rendered, but no compensation for the loss of the oportunity of being employed against the estate claimed by the heirs he represents.

On the merits we think with him, that the plaintiff has not proven, nor even alleged any services rendered by him, and from the state in which the succession was, both at the time of his appointment and at the time of the inception of the present suit, it is not to be imagined he rendered any. Indeed, his claim is professedly to be indemnified for the chance he has lost of being employed against the estate, and not for any services pretended to have been rendered to the absent heir. The law allows remuneration for services rendered, but no compensation for the loss of the opportunity of being employed against the estate.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the Court of Probates be affirmed, with costs in this court; the costs to be paid by the appellant.

GUIDRY ET AL. *vs.* GUIDRY ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

In an action of partition and settlement between the heirs and surviving partner of a community, and payment is a principal ground of defence, although the evidence is not conclusive, in consequence of the lapse of time since the transaction, which was among relations whose confidence tends to dispense with the formalities usually attending transactions between strangers, and the judgement is in favor of the defendant, it will not be reversed.

This was an action of partition and settlement by the heirs and legal representatives of the late wife of Joseph Guidry, pére, against the latter, as survivor of the community, claiming from him his deceased wife's half of the estate as her heirs.

Joseph Guidry, pére, answered that he was and always had been ready to settle and account for his wife's half of the community. The heirs also contended that the wife of Joseph Guidry, fils, deceased, was bound to collate a negro man, or half his value, which had been purchased with money advanced by the father to his son, while the community existed. The widow of Joseph Guidry, fils, and deceased son of the defendant, alleged and showed a written bill of sale, that the negro man in contest was purchased by her husband in 1811, for the sum of two hundred dollars, which sum was lent by the defendent to his son, to enable him to make the purchase; but that it had been repaid with interest.

The evidence in the cause went to support this position.

The plaintiffs averred, that if the bill of sale was really executed as it purported, and the purchase of the son made in pursuance, that it amounts to a donation from the father to the son, and ought to be collated.

The widow Guidry, fils, had judgement confirming the negro to her and her children, who are heirs of her late husband. The plaintiffs appealed.

PORTER, J., delivered the opinion of the court.

According to our first impressions after the argument was concluded, there was required for decision of this cause, the solution of a question of frequent occurrence and considerable importance, namely, whether a child who had received a gift from his father of community property during marriage, was compelled to collate the one-half of it, when they come to partake, with their brothers and sisters, of their mother's estate, a portion of which was formed of acquests and gains made during her marriage with the donor.

In an action of partition and settlement between the heirs and surviving partner of a community, and payment is a principal ground of defence, although the evidence is not conclusive in consequence of the lapse of time since the transaction, which was among relations whose confidence tends to dispense with the formalities usually attending transactions between strangers, and the judgement is in favor of the defendant, it will not be reversed.

But on a further and more minute examination of the evidence, we find that the decision of the question is not necessary in order to enable us to settle the rights of the parties before us. One of the principal grounds of defence in the court below, was the repayment by the son to the father, of the money at one time advanced by him. The evidence on this head is not so conclusive as could be desired, but considering the length of time since the transaction took place and the death of the party making the repayment, the confidence which existed between persons so nearly connected, and the tendency of that confidence to dispense with the formalities which usually attend transactions between strangers, it is not, perhaps, a matter of surprise that it is not more satisfactory. It convinced the judge below, and upon the rule well established in this court that where the decision of the inferior tribunal turns on a question of fact, and that fact be doubtful,

we will not reverse the judgement. We think that which was rendered in this case should not be disturbed.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the court below be affirmed, with costs.

Simon, for plaintiffs.

Crow and *Bowen*, for defendant and widow Guidry, fils.

BLANCHET *vs.* HELLEBRANT.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Where the wife has obtained judgement against her husband setting apart certain property as hers exclusively, but gives no power to issue execution to enforce her claim, if the husband afterwards carries off the property, his creditors cannot charge her with fraud and collusion arising from the fact that the property was suffered to remain in the power of the husband, and compel her to follow the property out of the jurisdiction of the United States to enforce her judgement claim.

The petitioner sues for the separation and recovery of certain property in the possession of her husband, which she claims as paraphernal. She had a judgement rendered in her favor in 1827, for the articles of property brought by her into marriage, and her claim for six hundred and seventy-two dollars in money was cumulated with the actions of the creditors of her husband, and she separated in property from him. Since then, several creditors of her husband seized a tract of land, a negro boy, and all the cattle and horses branded with her brand. She alleges that this property was in her pos-

WESTERN DIS. Sept. 1832.

BLANCHET vs. HELLEBRANT.

session, subject to her tacit or legal mortgage, and under exclusive control. She has doubts whether she can execute her former judgement; and after setting up claim to three hundred dollars and some other articles of personal property, inherited by her and received by her husband since the former suit, she prays for a new judgement of separation and for an injunction restraining the creditors of her husband from proceeding any further until her entire claim is satisfied. The husband and seizing creditors were cited in.

Thos. B. Brashear & Co. and Wm. & D. Flower, judgement creditors of the defendant, appeared and filed separate answers, but both in substance and effect alleged fraud and collusion between the plaintiff and her husband, charging the former with interposing obstacles to the creditors' just claims on the husband, suffering him to remain in possession of the property decreed to her in the judgement of separation, and of transporting it out of the United States to the province of Texas. They pray she be prohibited from interposing against the claims of her husband's creditors, and that her claims be postponed to those of the creditors, until the property she assisted her husband to run off to Texas be fully accounted for.

Robert Perry, a witness for the creditors and interpleaders, stated that the defendant informed him that he had marked one hundred calves in Texas in 1830; had taken cattle from this state to Texas, and these calves were the produce or increase of them. It was agreed "to estimate three head of horned cattle for every marked calf." The plaintiff had judgement for six hundred and sixty-five dollars and fifty cents in money, the negro boy Pierre, ninety cows and calves, nine heifers and two bulls, and some other personal property; that she be separated in property from her husband and recover the above property in kind, and the sum of money named. But the court was of opinion that since she obtained her former judgement against her husband, she had improperly and collusively suffered him to remove their cattle to the province of Texas, where he has now three hundred head.

It was ordered that she take the cattle adjudged to her from those in Texas, and also satisfy her claim for the sum of six hundred and sixty-five dollars and fifty cents, out of the balance of the said cattle in Texas, before coming on any property of the defendant in this state. The injunction was made perpetual in relation to the articles adjudged to the plaintiff in kind, except the cattle, and dissolved as to the remainder. The plaintiff appealed.

PORTER, J., delivered the opinion of the court.

In August, 1826, the plaintiff commenced an action against the defendant, for a separation of property, which, in April, 1827, ripened into a final judgement. By this judgement, certain specific objects, brought by her into marriage, were set apart for her use, and a further claim of six hundred and seventy-two dollars, which she advanced for money received by the defendant, was directed to be cumulated with suits which the creditors of the husband had commenced against him. The decree conferred on the plaintiff the administration of her own affairs, and inhibited the defendant from intermeddling with it.

The petitioner in this case states that the judgement rendered in the suit just alluded to, never had been carried into execution, nor could it be enforced, as it was not executed at the time as the law directs; that various creditors have, since its rendition, taken out executions against her husband, whose affairs are in the utmost disorder; and that she fears property will not be left to satisfy her demand.

She prays a judgement which may definitively settle the amount due to her; that it be rendered contradictorily with the seizing creditors, and that she be declared a mortgaged and privileged creditor, for the amount due to her.

The creditors appeared and answered this petition, and charged the plaintiff with fraud and collusion, in not carrying into effect the former decree of separation, obtained by her, and in permitting the husband to administer her estate and

WESTERN DIS. Sept 1832.

BLANCHET vs. HELLEBRANT.

remove it out of the jurisdiction of the court and the courts of the United States, viz: into the province of Texas.

They joined to this averment of fraud, a general denial of all the matters and things set out in the petition.

The cause came on for trial on these issues. The court considered, that in addition to the specific objects brought by the plaintiff into marriage, there had been received by the husband, six hundred and sixty-five dollars and fifty cents, and gave judgement accordingly. But considering the fraud and collusion to be established, it decreed she should enforce her judgement on the cattle in the province of Texas, before she levied on any within this state.

There is not any, the slightest evidence of fraud, appearing on the evidence sent up in the record, save that which may be presumed from the plaintiff's not prosecuting her claim more promptly against her husband. But the first judgement did not enable her to issue execution against him; it did nothing more than set aside specific objects as her property, and directed her claim for money to be cumulated with the suits of the creditors. Before this action was tried, or could be tried in the course of legal proceedings, the husband removed the cattle to Texas.

Where the wife has obtained judgement against her husband, setting apart certain property as hers exclusively, but gives no power to issue execution to enforce her claim; if the husband afterwards carries off the property, his creditors cannot charge her with fraud and collusion arising from the fact that the property was suffered to remain in the power of the husband, and compel her to follow the property out of the jurisdiction of the U States, to enforce her judgement claim.

Unwilling as we are to place our conclusions in a case of this kind in opposition to the judge who tried the cause below, we do not see how the conclusion of fraud can be drawn from the circumstance, that she did not take out an injunction to prevent the property being removed. It is not even shown she knew of his intention to take it away. The creditors in this case are as open as she is to the imputation; for it was as fraudulent in them not to arrest the property, as it was in her to fail to do it.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be annulled and reversed, in so much as it prohibits the plaintiff from taking out execution in this state, until she discusses the property in the province of Texas, and that it be affirmed for the remainder;

and it is further ordered, that the appellees pay costs in both courts.

Simon, for plaintiff. *Brownson*, for defendant.

WIDOW AND HEIRS OF DE LA HOUSSAYE *vs.* SAUNDERS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

A title to a tract of land, supported by a Spanish order of survey, made in 1794, actual survey by the surveyor general in 1798, and confirmation by United States land commissioners in 1811, will not prevail over a title founded on a prior order of survey, granted in 1781, and confirmed by the commissioner's certificate in 1812, accompanied by possession.

Titles to land, emanating from the Spanish government, not carried out into grant, are deemed incomplete and inchoate, and the certificate of the United States land commissioners, leaves conflicting titles acquired under the former government, precisely as they were, to be tested and settled by principles of equity rather than of positive legislation.

When an older order of survey is vague and indefinite as to locality, a younger title, perfected so far as to designate the plans of the grant and permission to settle by actual survey should prevail.

The plaintiffs claim one thousand six hundred superficial arpens of land on the bayou Teche, which is in possession and also claimed by the defendant. From the testimony, there is no dispute about the *locus in quo;* the superiority of title alone forms the issue between the parties.

WESTERN DIS. *Sept.* 1832.

WIDOW AND HEIRS OF DE LA HOUSSAYE *vs.* SAUNDERS.

The plaintiffs claim title under a *requête* and order of survey granted to their ancestor by the Spanish governor, in November, 1794, and a plat and certificate of a survey of the land, made at the instance of P. De la Houssaye, the grantee, by Carlos Trudeau; and also by the land commissioner's certificate of confirmation, dated 30th May, 1811. Possession under this title was attempted to be proved by parole, but failed.

The defendant set up the following chain of title: 1. *Requête* and order of survey, granted to Eliza P. Cunez, in September, 1780; a certificate of the commandant of Attakapas, of the same date; and order of survey, by governor Galvez, dated 20th June, 1781. 2. A conveyance from Eliza P. Cuney and Cesar Archinard, her husband, to Nicholas Gréenard, in August, 1786; and from Joseph Latiolais to defendant, in September, 1808, ratified by widow Gréenard. 3. Certificate of confirmation of the land commissioners, to the heirs and legal representatives of Nicholas Gréenard, dated February first, 1812, founded on the order of survey in favor of Madame Cuney, for thirty arpens with depth of forty, on each side of the bayou Teche, and ten arpens in the island of Tocané, and bearing date 20th June, 1781. This title covered the *locus in quo*, and was accompanied by possession in the different proprietors up to the present defendant.

There were two verdicts, and judgement on the last for the defendant. The plaintiff appealed.

On the trial, several bills of exceptions were taken to the introduction of testimony, both written and parole, and to the manner of proceeding, which were abandoned in the argument in this court. The question turned on tne superiority of title.

MATHEWS, J., delivered the opinion of the court.

In this case, the plaintiffs state themselves to be the owners of a certain tract of land, situated in the parish of St.

Mary, on both sides of the bayou Teche, containing one thousand six hundred arpens, superficial; that the defendant took possession of said land in violation of their rights, &c. He, in his answer, sets up title to part of the land claimed by the plaintiffs.

The cause was submitted to a jury in the court below, who found a verdict for the defendant, and judgement being thereon rendered, the plaintiffs appealed.

The case, as it stands before the court, presents only a question relating to the validity and superiority of the titles offered in support of the respective claims and pretensions of the parties; the *locus in quo* being established by the testimony.

A title to a tract of land, supported by a Spanish order of survey, made in 1794, actual survey by the surveyor general in 1798, and confirmation by the United States land commissioners in 1811, will not prevail over a title founded on a prior order of survey, granted in 1781, and confirmed by the commissioner's certificate in 1812, accompanied by possession.

The plaintiffs title is supported by an order of survey, issued under the Spanish government in 1794, in favor of their ancestor; and a plat of survey as having been made by Carlos Trudeau, surveyor general of the province in 1798, and a confirmation of this title by the commissioners of the land office, bearing date on the 30th May, 1811. The defendant's title is derived by regular mesne conveyances from Eliza P. Cunez, who obtained an order of survey from governor Galvez, dated on the 20th of June, 1781; he also claims title under the prescription of ten years. The plea of prescription, is, however, not supported by the testimony.

The title under which the defendant claims, was also confirmed by the commissioners of the United States, by a certificate dated on the first day of February, 1812. From this statement, it is readily perceived that the original titles under which both parties claim the premises in dispute, are and were incomplete; no grant having been made in form by the authorities of the Spanish government.

Titles to land emanating from the Spanish government, not carried out into grant, are deemed incomplete and inchoate, and

Confirmations from the United States, as successors to the rights of Spain on the public domain, leave the titles to property acquired by individuals from the former government, precisely as they were, or would have been under that power, in contest between claimants. Neither of the parties in the present case having obtained a formal cession of the land in

dispute, their claims must be tested rather by principles of equity, than those which arise out of positive legislation.

We find the defendant in possession, under an order of survey, older by many years than that which constitutes the incipiency of the plaintiff's title. It is true that their ancestor proceeded a step further, necessary to the completion of his title, than had been done by the grantee under whom the defendant claims; Delahoussaye having caused his land to be surveyed by the proper officer of the Spanish government; and had he taken actual possession under this survey, it is probable that his title ought to be considered as being preferable to that, by virtue of which, the defendant claims, notwithstanding the latter is older in date; or when an older order of survey and permission to settle is vague and indefinite as to locality, a younger title perfected, so far as to designate the plan of the grant and permission to settle by actual survey, should prevail. But the mere act of the surveyor in laying off a tract of land, at the request of the claimant, should not be allowed to infringe the rights of another person already acquired; such officer being merely ministerial, and without power to grant or concede any part of the public domain, his simple act of surveying, gives no additional strength to a title acquired from the sovereign, when not followed by a grant in form. In the present case, an attempt was made on the part of the plaintiffs, to prove an actual settlement on the disputed premises, by authority of their ancestor; the testimony relative to this fact, is contradictory, and from the verdict of the jury, it may fairly be inferred, that they negatived its existence.

The petition presented by Mrs. Cuney to governor Galvez, and his order on it, were made in terms to give certainty to the place where she wished to obtain the grant of land in the island, called Tocane, by the reference to Boutte's line. We have, therefore, a case presented for decision, in which the titles offered by the respective parties, are of equal dignity; but that under which the defendant claims, is older in date, and he in actual possession. If the principles assumed are

the certificate of the United States land commissioners leaves conflicting titles acquired under the former government, precisely as they were, to be tested and settled by principles of equity, rather than of positive legislation.

Where an older order of survey is vague and definite as to locality, a younger title perfected so far as to designate the plan of the grant, and permission to settle by actual survey, should prevail.

correct, the judgement of the court below, ought not to be disturbed.

The decision in the case of Gonsolins *vs.* Brashear, in no manner conflicts with these principles. It is true that the youngest title prevailed, but it was supported by possession; in the present case, effect is given to the oldest title, accompanied with possession.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be affirmed, with costs.

Simon, for plaintiffs.

Brownson, for the defendant.

HEIRS OF THOMPSON *vs.* BELL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

Where a slave or other mortgaged property passes out of the hands of the mortgagor, and is sold at the probate sale of the third possessor's succession no lien or mortgage attaches on the proceeds of such sale, because the mortgagee is not a creditor.

The mortgage gives to the mortgagee a real right upon the thing mortgaged, which he may exercise upon the property or thing mortgaged, into whose hands soever it may come.

This suit is brought to recover the balance of the price of a slave, sold at the sale of the estate of John Davis, deceased, of which G. H. Bell is the administrator.

In December, 1819, the succession of Wm. Thompson, deceased, was sold by order of the judge of probates, and

WESTERN DIS. *Sept.* 1832.

HEIRS OF THOMPSON *vs.* BELL.

among the items, there was a negro man named Randall, sold to Wm. Haslett for one thousand five hundred and ten dollars, who gave Wm. Moore and M. Collins as his sureties, the slave remaining mortgaged until payment of the purchase money. In 1822, the plaintiffs, as the heirs and legal representatives of Wm. Thompson, deceased, obtained a judgement in the District Court for the parish of St. Landry against Haslett and his sureties, for one thousand and six dollars and sixty-six cents, the balance due on the price of the slave Randal. This judgement was duly recorded in December, 1823, and operated as a general mortgage on the estates of the parties to the judgement, and the vendor's privilege still attaching to the slave Randall. Execution issued on the above judgement, was levied on Randall and sold to Wm. Haslett the 23d of September, 1823, for one thousand two hundred and sixty-two dollars, and a twelve months' bond taken, with George King as surety, the slave remaining mortgaged for the amount of the bond with interest. In June, 1825, Wm. Haslett sold and conveyed this slave to John Davis, with all the previous mortgages and privileges on him, for one thousand two hundred dollars. Davis died in 1826, leaving the slave Randall a part of his succession. Guy H. Bell was appointed administrator of the estate, which was accepted with benefit of inventory by the heirs. Randall was sold by the administrator at the sale of the succession to Joseph Irwin, for one thousand two hundred dollars, which has been paid to the administrator.

The plaintiffs now claim a balance on the original price of said slave of seven hundred and fifty four dollars, with ten per centum interest from the 19th day of July, 1829, until paid, and all costs, &c. This balance the plaintiffs claim as a privileged demand of the administrator of John Davis's estate. They pray judgement against G. H. Bell for this balance and for costs.

The defendant alleges that Davis purchased Randall of Wm. Haslett, for the price of one thousand two hundred dollars (cash paid), in good faith and in ignorance of all the

incumbrances alleged in plaintiff's petition; that said slave has since been sold, and is out of his (defendant's) possession, and there is no agreement binding Davis's succession to pay the price. He avers that the plaintiffs have no right to claim the sum due on the price of said slave from the succession of Davis, until they have proceeded by law to collect the same of the sureties of Wm. Haslett on his orginal and other purchases, &c. That in truth a judgement has been already obtained against the said Haslett and his sureties; which they are bound to pursue until they have exhausted this remedy before calling on Davis's succession. He avers the plaintiffs have not exhausted and pursued their legal remedies against the said sureties, or made any efforts to collect the same from the sureties; and not having done so, they cannot maintain this suit.

In an amended answer the defendant avers that no special mortgage or privilege was reserved in the judgement against Haslett and his sureties, and the twelve months bond was never recorded; and if any mortgage is retained, the same not being recorded, is null and of no effect against the succession of Davis, who purchased in ignorance thereof, &c.; that as Haslett, the principal debtor, has surrendered his property to his creditors, the plaintiffs should satisfy their demand out of the property surrendered, being more than sufficient, they having a prior or equal privilege or mortgage with said demand. He pleads discussion of Haslett's property surrendered, &c. There is a bill of exceptions taken by plaintiffs to the decision of the court admitting the defendant to file an amended answer the next day after the evidence was gone through, and arguments of counsel heard in the cause.

The case was transferred to the District Court for trial and decision, the probate judge being interested. Judgement was given for the plaintiffs to be paid out of the proceeds of the sale of the slave Randall, &c. The defendant appealed.

It was admitted the twelve months bond given by Haslett, with judge King security, was never recorded. That Moore and King are worth property abundantly sufficient to satisfy

WESTERN DIS. Sept. 1832.

HEIRS OF THOMPSON vs. BELL.

said demand, and that the amount of the sales of Haslett's estate surrendered to his creditors, is between four and five thousand dollars.

Garland, for plaintiffs:

1. An amended answer cannot be filed after the cause has been tried and submitted to the judge for his decision. 11 *Mar.* 640. *C. of Pr.* 420.

2. After answering to the merits, no dilatory exceptions can be put in or raised by way of amendment. *C. Pr.* 420.

3. Discussion is a dilatory exception and must be plead *in limine litis*, as must all others which do not relate to the absolute incompetency of the judge. *C. Pr.* 332–3.

4. The plaintiffs have a mortgage by virtue of the terms of sale of their ancestor's estate, on the negro slave Randall, which was duly recorded, and has effect against possessors of the mortgaged property.

5. Davis, the third possessor here, being dead, and the negro having been sold at the probate sale of his succession, in pursuance of an order of the creditors, the proceeds of such sale in the hands of the administrator, is liable to the plaintiffs. 2 *Mar. N. S.* 336, 225.

6. Administrators are bound to sell the property of the succession without distinction; that which is mortgaged as well as that which is not. *La. Code*, 1051, *&c.*

7. When an insolvent estate is managed by an administrator, he is to proceed in the same manner in regard to the sales and administration of the property, as the syndics of a ceding debtor. *Session acts of* 1826, *p.* 40, § 7—9. 2 *Moreau Dig.* 438, § 7—9.

8. Mortgaged property must be first seized and sold, and in default of proceeding against the thing mortgaged, when sold by authority of justice, the price in the hands of the administrator, must be proceeded against. *Session acts of* 1817, *p.* 38, § 18. *D'Ende* vs. *Moore*, 2 *Mar. N. S.* 336.

Bowen, for defendant.

PORTER, J., delivered the opinion of the court.

This action commenced in the Court of Probates of the parish of St. Landry, and was transferred to the District Court, in consequence of the probate judge having an interest in the cause. The defendant represents the estate of an intestate, who was possessor of a slave, on which the plaintiffs had a mortgage. At the sale of the property of the succession, the slave was disposed of, and the proceeds have come into the hands of the administrator. The plaintiffs claim a privilege on these proceeds, which they say represent, and stand in place of the property on which they had a mortgage.

This position would be correct, if the plaintiffs were creditors of the succession; but they are not. The mortgage they seek to enforce, is one arising out of a sale made to Haslett, who sold to the intestate; so that the latter stood, and his representative stands, in relation to the plaintiffs, as third possessor of mortgaged property. Viewed as such, we see no ground on which this action can be maintained; the law, for the purpose of the easier settlement and more correct distribution of the funds of estates, represented otherwise than by heirs, who accept purely and simply, has provided that the creditors shall present their claims *in concurso*, and that the proceeds of the property sold, shall, for the adjustment of their respective pretensions, and the payment of them, be considered as representing the thing disposed of; but the mortgagee, who has a lien on property which has passed into the hands of another, other than the mortgagor, is not the creditor of the third possessor; he has a real right which he may exercise on the thing, and nothing more; a right which is confined to the object affected, which ceases with its destruction; which producing only responsibility on the possessor, ceases to produce any when the possession terminates. All the provisions of our law, in relation to the hypothecary action, sustain this view of the case; they give the right to the creditor to seize and sell the thing mortgaged; they confer none on him, in case the property has been sold by the third

Where a slave or other mortgaged property passes out of the hands of the mortgagor, and is sold at the probate sale of the third possessor's succession, no lien or mortgage attaches to the proceeds of such sale, because the mortgagee is not a creditor.

The mortgage gives to the mortgagee a real right up-

WESTERN DIS. Sept. 1832.

HEIRS OF CARLIN vs. LEWIS.

possessor, and the possession transferred to another. If this action should be maintained, it is not seen on what grounds any person, through whose hands the object subject to the lien had passed, could be made responsible for the price received by him for it; but this could not be seriously contended for. Then, again, if the right existed, the party who had once owned the property, and sold it without warranty, would be made responsible, though the purchaser could have no recourse against him, if evicted by the hypothecary action. *Code of P.* 61, 70. 6 *Mar. N. S.* 384.

on the thing mortgaged, which he may exercise upon the property or thing mortgaged, into whose hands soever it may come.

It is, therefore, ordered, adjudged, and decreed, that there be judgement against the plaintiffs, as in case of non suit, and costs in both courts.

HEIRS OF CARLIN *vs.* LEWIS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

The plea of payment is a question of fact, which is made out from documentary and other evidence; and when it appears from all the circumstances and presumptions arising out of the evidence, to be proved, the judgement of the inferior court in favor of the defendant, will not be disturbed.

The plaintiffs in right of D. Carlin, deceased, claim from the defendant three hundred dollars, with interest, which they allege the latter obligated himself to pay to their deceased ancestor, as the difference in price between two tracts of land, which the parties exchanged with each other, in September, 1813. The clause in the deed of sale and

exchange between the parties relied on, says: "And in case the said claim of land should be confirmed to the said Lewis, and he secured in the title thereof, then, and in that case, the said A. Lewis is to pay to the said Dennis Carlin, three hundred dollars, in part consideration thereof." The plaintiffs shewed that the title had been confirmed, as stipulated, by the government.

The defendant being absent, a curator *ad hoc* was appointed to defend. He made affidavit, and called on the plaintiffs for the production of a bond, for two thousand five hundred and twenty-three dollars, which D. Carlin, in his lifetime, had given to the defendant, and which he averred had been paid in part, by the very sum of three hundred dollars now claimed, being credited on it. The bond could not be found. The defendant plead payment, and the prescription of five, ten, and twenty years, &c.

The District Court gave judgement on the ground, the debt had long before the institution of this suit, been paid; and decreed that the plaintiffs be for ever barred from setting up any claim for the same cause of action. The plaintiffs appealed.

The fact of payment was made out by circumstantial and presumptive evidence, arising out of the transactions between the parties and the lapse of time.

Simon, for the plaintiffs, submitted the case without argument, on the ground that the defendant had not made out his proof.

Bowen and *Lewis*, for the defendant, submitted the case.

MARTIN, J., delivered the opinion of the court.

The plea of payment, is a question of fact, which is made out from documentary and other evidence; and when it appears from all the circumstances and presumptions arising out of

The plaintiffs claim a sum of money on a sale, confirmation and exchange of lands between their ancestor and the defendant. He pleaded the general issue, payment and prescription. The plaintiffs are appellants from the judgement, by which the court decreed, that it appearing to its satisfaction, that the debt claimed by the plaintiffs was paid and extin-

WESTERN DIS. Sept. 1832.

STEWART vs. BERARD.

the evidence, to be proved, the judgement of the inferior court in favor of the defendant, will not be disturbed.

guished, there should be judgement for the defendant. This question of fact, is the only one complained of; and the case has been submitted to us without argument. There is documentary and other evidence; the examination of which has led us to the conclusion, that the judge did not err.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be affirmed, with costs in both courts.

STEWART *vs.* BERARD.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

Where a case rests entirely on matters of fact, and a verdict and judgement rendered for the defendant in the inferior court, and a motion for a new trial overruled, the judgement below will not be touched, especially when the evidence shows no apparent error in the first decision.

The plaintiff claims a negro woman, named Venus, and her children, as heir to Bernard Stewart, her paternal grandfather, and which are in the possession of the defendant. In 1809, Bernard Stewart died in Attakapas, leaving Catharine Stewart, his grandaughter, as the only heir in the descending line. The negro woman Venus, with one child, belonged to his succession at his death. His son's wife, Elizabeth Stewart, and mother of plaintiff, in 1812, sold this woman and child to the defendant, for the sum of eight hundred dollars. The petitioner states that in 1813, she was removed by her mother to Kentucky, where she still resides, and that she is twenty-three years old at the institution of this suit. She prays that

the negro woman Venus, and her children, be delivered to her, together with one thousand five hundred dollars damages, for their hire and detention.

The defendant pleaded a general denial; set up the sale by the mother to him; averred possession for more than ten years by a good title; and pleaded the prescription of five and ten years, also of four years against her right of action, more than this time having elapsed since she arrived at the age of majority, and before bringing this suit.

It appears Bernard Stewart had a son named Christopher P. Stewart, who died in the lifetime of his father, leaving three daughters, viz: Catharine (the present plaintiff), Mary, and Agnes Stewart. The grandfather having died in the year 1810, Elizabeth Stewart was appointed tutrix to her three minor daughters, who were also heirs-at-law of their grandfather, Bernard Stewart. That the tutrix sold the slaves in contest, which were received from B. Stewart's estate to defendant, in Attakapas, in 1812, and in 1813 removed to Kentucky. The plaintiff now claims, as the only heir living. But the testimony shows that the mother of the plaintiff is still living, who inherits from her two deceased daughters, and sisters to the plaintiff.

On the trial, there was verdict for the defendant, which, after a motion for a new trial and overruled, was confirmed by the judgement of the court. The plaintiff appealed.

The case was submitted without argument or points of counsel.

Where a case rests entirely on matters of fact, and a verdict and judgement rendered for the defendant in the inferior court, and a motion for a new trial overruled, the judgement below will not be touched, especially when the evidence shows no apparent error in the first decision.

MARTIN, J., delivered the opinion of the court.

No question of law has been raised in this case. It rests entirely on matters of fact, on which a jury has been called upon to pronounce. Their verdict has been for the defendant; and the first court has overruled the plaintiff's motion for a new trial on the ground of the verdict being against the evidence adduced.

WESTERN DIS. *Sept.* 1832.

SHARP ET AL. *vs.* KNOX.

A close attention to the testimony and documents has not enabled us to discover any ground on which the judgement should be touched.

It is, therefore, ordered, adjudged, and decreed, that the judgement be affirmed, with costs in both courts.

Bowen, for plaintiffs.
Simon and *Brownson*, for defendant.

SHARP ET AL. *vs.* KNOX.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Agreements must be enforced according to the intentions of the parties, unless some legal obstacle exists to their execution, apart from the difficulty of giving them a formal denomination or a name.

A confirmatory act, confirming and ratifying a will and compromising a law suit instituted to annul it, for an annual compensation in lieu thereof, &c., will be considered as a transaction.

A transaction may be rescinded, where there is error in the person or the matter in dispute, or when it is made in execution of a title which is null unless the parties compromised on the nullity, or if made on titles ascertained to be false.

A transaction, ratifying and confirming a will, which contains one or more grounds of nullity, cannot be rescinded.

It is not sufficient ground to set aside a transaction curing the defects in a will that the title derived under it is void, where that is the very ground or matter on which the parties compromised.

The petitioner and three descendants, instituted suit, in November, 1830, to recover from the defendant the succession of Eleanor O'Donogan, a deceased daughter, and the late wife of William G. Knox. Eleanor had bequeathed her estate to her husband. The plaintiffs alleged that Knox was incapable of inheriting, because of an *empêchement dirimant*, the existence of a previous marriage in Ireland, and that the will was defective in many respects, both as to form and substance, and is null and void; and that Knox has taken possession of the estate under the will, as also the estate of her husband and two deceased sons, amounting in all to about twenty thousand dollars. They ask for an inventory and appraisement of the property, that it may be partitioned among them.

Eleanor O'Donogan, the wife of Knox, made her will and died in November, 1829. The mother, and now plaintiff, became dissatisfied, and brought suit to annul the will, on account of several alleged defects and causes of nullity, and to recover the estate of her daughter. During the pendency of this suit, she agreed to relinquish her claim to the estate and confirm the will, in consideration of one hundred dollars per annum, to be paid to her by Knox during her natural life. A confirmatory act was drawn up, reciting all the alleged nullities in the will; ratifying and confirming it in every particular, and stipulating the motives moving her to the act, and the consideration of one hundred dollars a year during her life, to be paid to her by Knox. This act was executed in July, 1830, by the parties, after explaining its meaning and effect to the plaintiff, in presence of a notary and witnesses. The former suit, pending at this time in the Probate Court, was dismissed for the want of jurisdiction. The present action was instituted in November following. The plaintiffs allege fraud in procuring the plaintiff, who was an old woman of seventy, to sign the confirmatory act. They pray that the will be annulled, as also the confirmatory act; the latter on account of fraud and lesion; and that an estimative inventory be taken of the property, and the title to

the same be confirmed to them, and that Knox be declared without law or right to it, &c.

The defendant pleaded a general denial; averred the successions of the husband and two sons of the plaintiff have been long since settled and accounted for; sets up title to all the estate of Eleanor O'Donogan, his deceased wife, under the will, and confirmatory act of July, 1830, and prays to be quieted in his possession of the property, &c.

On the trial there was no proof that the defendant labored under any disability on account of a former marriage, but on the contrary he showed an excellent character and exemplary conduct. There was no evidence of fraud or improper conduct either in the execution of the will or confirmatory act.

Gayoso, for the plaintiff:

1. The will under which the defendant claims is absolutely null, whether considered as a private or public act.

2. That as a nuncupative will by public act it should have been received by a notary public and three witnesses residing in the place. *L. Code*, 1571.

3. The will should contain enunciations of all that was necessary to its validity; "express mention of the whole," &c. *L. Code*, 1571. That the enunciation of the place where it was executed is an essential one. 5 *Toullier*, *no.* 386. Besides that as an authentic act it should make full proof of itself. To allow the absence of the essential enunciations to be supplied by parole, would be to complete the act at different times, and would contravene the provisions of the *L. Code*, 1571, 2256.

4. To be valid as a public act, the will should have been dictated to the notary by the testator, in presence of the witnesses. *L. Code*, 1571. 5 *Toullier*, *no.* 410—13, 417. 3 *Martin*, 166.

5. It is required that the will must be written by the notary as dictated by the testator, and that all the formalities be performed at one time. *Ibid.* 5 *Toullier*, *no.* 408.

6. The will is absolutely null, and cannot be made better by the confirmatory act. The nullities in a will can only be cured by a new will, executed in due form of law. 8 *Toullier, no.* 320. *Masse's Parfait Notaire,* 3 *vol.* 283.

7. If the confirmative act was not itself an absolute nullity, and could have any effect, it could only cure those nullities in the will which were specially set forth, and those only which the parties had in view at the time, and left open to attack all the others. *L. Code,* 2252. 8 *Toullier, nos.* 497–8.

8. The confirmative act was bad as a renunciation of the succession in favor of Knox, on account of error; as a compromise, because made in execution of a title which is null. *L. Code,* 1832, 1834, 3047–8.

Lewis and *Bowen,* for defendant.

PORTER, J., delivered the opinion of the court.

The plaintiff was mother and the defendant was the husband of Eleanor O'Donogan, deceased. The latter made her last will and testament, by which she instituted the defendant her universal heir. Difficulties arose between the parties in relation to the disposition of the testatrix's property, and a suit was instituted to set the will aside. Pending this suit, the parties went before a notary and entered into an agreement, by which the plaintiff declared "that having heard the said will and testament read, and having maturely deliberated on the contents thereof, in consideration of the good will and affection she cherishes for the said Wm. G. Knox, and as well as to carry into full effect the dying requests and intentions of her deceased daughter, and also for the further consideration of the premises hereinafter expressed, she hereby agrees to ratify and confirm, and does by these presents ratify and confirm the said last will and testament of her deceased daughter, in all its parts."

The instrument proceeds to recite the will and to set out various causes of nullity, for which it had been, or it was supposed might be attacked, and it concludes as follows:

WESTERN DIS. *Sept.* 1832.

SHARP ET AL. vs. KNOX.

"Now, therefore, the said Mary Sharp, by this public act hereby expressly renounces all exceptions to any and all of the above defects and nullities, as above enumerated and set forth, and with the express motive and intention of supplying and curing all said defects, she makes this renunciation, and hereby ratifies and confirms said will and testament in all its parts, and abandons all claims and pretensions whatever to the property bequeathed in the same; and does hereby give, grant, and assign over, to the said Wm. G. Knox, who is here present and accepts of the same, all her right, title, and interest, in the succession of her said deceased daughter."

In consideration of the premises, the defendant by the same act promised to pay the plaintiff one hundred dollars per annum during the term of her natural life.

Before entering into the consideration of the questions of law which have been raised and discussed at the bar, it is proper to state that we do not see in the record sufficient evidence to prove that this agreement was procured by fraud, or that improper means were practised to obtain the plaintiff's signature to it.

This agreement is said be be good either as

1. A sale. 2. An onerous donation. 3. A transaction.

Agreements must be enforced according to the intention of the parties, unless some legal obstacle exists to their execution apart from the difficulty of giving them a formal denomination or a name.

A confirmatory act, confirming and ratifying a will, and compromising a law suit instituted to annul it, for

It is somewhat difficult to know under what head of contracts this instrument should be classed. But agreements cannot fail of their effect because they are not susceptible of a formal denomination. It is the duty of courts of justice to enforce them according to the intentions of the parties, unless some legal obstacle exists to their execution apart from the difficulty of giving them a name. We deem it unnecessary to examine whether this instrument be a sale or donation, remarking that we do not believe it was contemplated by the parties to be either. We shall cousider it on the last ground assumed, that it was a transaction. A transaction or compromise is defined by our code to be "an agreement between two or more persons, who for preventing or putting an end to a law suit, adjust their differences by mutual consent in the manner which they agree on, and which every one of them

prefers to the hope of gaining, balanced by the danger of losing." It appears to us the agreement now before us comes within this definition. A law suit was pending, by which the plaintiff claimed the whole of her daughter's succession. She agrees to surrender all claim in this estate for a certain sum. This necessarily put an end to the demand in justice, and it was obtaining something certain, to the hope of gaining, balanced by the danger of losing.

an annual compensation in lieu thereof, &c. will be considered as a transaction.

It is true a great many other considerations are thrown into the act, such as affection for the defendant, respect for the dying requests of the daughter, and then is a formal renunciation of various supposed irregularities in the will. Still, it appears to us, these in no measure deprive the act of its substantive quality; and that it is in truth a surrender of uncertain and contested rights for a certain sum of money, to be paid annually.

A transaction may be rescinded where there is error in the person or the matter in dispute; or when it is made in execution of a title which is null, unless the parties compromised on the nullity, or if made on titles ascertained to be false

It remains to consider the objections which may be made to the instrument, viewed as a transaction. They were all embraced by the argument of the counsel for the plaintiff. An agreement of the kind according to the provisions of our code, may be rescinded where there is error in the person, or the matter in dispute, where it has been made in execution of a title which is null unless the parties have compromised on the nullity, or if made on documents which have been since found false. *Lou. Code*, 3046—8.

None of the grounds of rescission reach this case. There was no error in the person, nor of the matter in dispute. It is true, as contended, all the objections which may be made to the will are not enumerated in the act; and it is equally true, these and the others therein set out, may, together or separately, be of sufficient force to deprive the defendant of his quality as heir. But the want of the quality which it was the object of the compromise to confer, cannot be considered an error of person by which the transaction becomes null. If that were true, then it would be impossible to transact on a disputed quality. There is not, in our judgement, more force in the objection that the title was null, for that is the

A transaction ratifying and confirming a will which contains one or more grounds of nullity, cannot be rescinded.

WESTERN DIS. Sept. 1832.

SHARP ET AL. vs. KNOX.

It is not sufficient ground to set aside a transaction curing the defects in a will, that the title derived under it is void; because that is the very ground or matter on which the parties compromised.

very matter on which the parties compromised. True, all the objections which may be made to the will are not set out in the agreement; but the code does not require this. All it exacts is, that the parties shall expressly compromise in regard to the nullity of the instrument. This was done here, and surely it would be presuming wide of what must be supposed their intentions, that the plaintiff would renounce one nullity and would not another. Then, there is no evidence before us that the facts on which the nullities now brought foward were unknown to the plaintiff, at the time of the transaction. Her error, therefore, and the error of the defendant, were errors of law, and we have an express provision of our code that a contract made for the purpose of avoiding litigation, cannot be rescinded for error of law. *Lou. Code*, 1840.

The article in our code which renders null a transaction made on false documents, has no application to one made on an instrument, the reality of which was not contested, when the legal effect of it was alone in dispute, and where the very object of the compromise was to renounce all advantage the party might derive from nullities; which, admitting the instrument to have an existence, denied effect to it as the last will and testament of the deceased.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be affirmed, with costs.

ETIE vs. SPARKS.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

In commutative or reciprocal contracts, where the agreement requires the performance of several acts, a partial performance authorizes a recovery to the amount which the other party is benefitted, but subject to a deduction of such damages as may be sustained by the failure to discharge the other parts of the agreement.

Where parole evidence is introduced to prove a demand, and it discloses the fact of a written demand having been made; the written notice must be produced, as the best evidence, or its loss or absence accounted for.

This case arose on a commutative contract, in which the plaintiff engaged and sold to the defendant, a certain quantity of plant cane, with the privilege of cultivating it with some stubble cane, on a piece of land; also, the hire of ten slaves, two work horses, and two yoke of oxen, &c. The defendant engaged on his part, to pay eleven thousand pounds of sugar, and molasses in proportion, to be delivered to the plaintiff in the month of February, 1830, following the date of their agreement, which was the year preceding. The plaintiff alleges the sugar and molasses have never been delivered; that the negroes were detained twenty-eight days after the crop was made, contrary to agreement; and the horses and oxen have not been returned. He prays to be paid the value of the sugar, molasses, hire of negroes, horses, and oxen, amounting to one thousand two hundred and seventy-five dollars and thirty cents.

The defendant plead a failure on part of the plaintiff, to perform his part of the contract, by which he had sustained damages to the amount of one thousand dollars, and filed an account for sixty-nine dollars against the plaintiff, and denied his right to recover any on his part.

WESTERN DIS. *Sept.* 1832.

ETIE *vs.* SPARKS.

There was a verdict and judgement in favor of the plaintiff, for six hundred and ninety dollars. After an unsuccessful attempt to obtain a new trial, the defendant appealed.

There was a variety of testimony to show a compliance on the one side and a failure on the other. The jury were satisfied the plaintiff supported his demand, and that there was fairly due to him six hundred and ninety dollars, the amount of their verdict.

There was also a bill of exceptions taken to the opinion of the district judge, refusing to hear one of the defendant's witnesses, who had been sent to make a demand on the plaintiff, of a performance of his part of the contract, until the letter the witness had written to the plaintiff, was produced. The judge also refused to give an order, as the trial had commenced, requiring the opposite party to produce it; but the defendant was allowed to prove his demand by another witness.

Simon, for plaintiff.

Splane, for defendant, contended:

1. That the contract contained mutual engagements, and that the plaintiff was bound to show a performance on his part before he could compel the defendant to perform his.

2. In all commutative contracts, one party must comply with the conditions on his part, before calling on the opposite party. In this case, the plaintiff has failed in most of his stipulations, and ought not to recover. *Pothier on Ob.* 4 *Term Rep.* 125, 671.

3. Parole testimony ought to have been admitted to prove the demand made by the defendant upon the plaintiff, when an order was refused to compel the adverse party to produce the letter written by defendant's agent. *Code of P.* 475.

PORTER, J., delivered the opinion of the court.

This action was instituted on a contract, by which the plaintiff sold to the defendant a quantity of sugar cane for

plants, and the right to cultivate the ensuing year, some stubble cane belonging to the petitioners; and by which there were hired to the defendant ten slaves, and some horses and work oxen. The matter principally contested in the court below, was the performance by the plaintiff of the obligations assumed by him in the agreement above referred to. The jury found a verdict in favor of the plaintiff for six hundred and ninety dollars and five cents. We have examined the evidence, and are of opinion they did not err. The defendant moved for a new trial, which being refused, he appealed.

In this court, he has raised several questions of law.

1. He contends the plaintiff cannot recover, because he did not perform all the obligations assumed by him in the contract.

In commutative or reciprocal contracts, where the agreement requires the performance of several acts, a partial performance authorizes a recovery to the amount which the other party is benefitted, but subject to a deduction of such damages as may be sustained by the failure to discharge the other parts of the agreement.

Where the agreement requires the performance of several acts, a partial performance authorizes a recovery to the amount to which the other party to the contract is benefitted; subject, however, to deduction of such damages, as may be sustained by the failure to discharge the other parts of the agreement. *Loreau* vs. *Declouett*, 3 *La. Rep.* 1.

On the trial, the defendant offered a witness to prove he made a demand on the plaintiff, to comply with the whole of his contract. The witness, on being interrogated, declared that he had made such a demand in writing. Objection was made to any parole evidence of the demand, it not being the best evidence of which the case was susceptible. The court sustained the objection. Whereupon, the defendant, by his counsel, applied to the court for an order on the plaintiff, to produce the document. This was repelled, on the ground the application came too late, the cause being on trial. The court refused to make the order, and the defendant excepted to this decision, as well as that which rejected the parole evidence.

Where parole evidence is introduced to prove a demand, and it discloses the fact of a written demand

The court certainly did not err in the first opinion. The defendant had no right to introduce parole evidence, unless he had showed he had used all means in his power to procure the better proof. But whether the court decided cor-

WESTERN DIS. Sept. 1832.

KNOX vs. DIXON'S HEIRS.

rectly in refusing the order, may be well doubted under the 473—75 *articles of the Code of Practice.* The case, however, does not require a positive expression of our opinion, as the defendant was subsequently permitted to prove the demand by another witness.

having been made, the written notice must be produced, as the best evidence, or its loss or absence accounted for.

Application was made for a new trial, on the ground of the misconduct of one of the jury. No evidence of the fact appears on record, and we cannot notice it.

The appellee has prayed the court to give interest on the verdict of the jury, and damages for a frivolous appeal; neither of which demands are, in our opinion, justified by the facts or the law of the case.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be affirmed, with costs.

KNOX *vs.* WIDOW AND HEIRS OF DIXON.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

The payee or first endorser on a bill or note is responsible to all the endorsers or parties who come after him, according to the *lex mercatoria*.

The *lex mercatoria* imposes on the endorser of accommodation paper, the obligation to pay every subsequent endorser or holder, in the same manner as in business paper.

And although the court can look beyond the form in which the parties clothe their contracts, yet without an express agreement to the contrary, it will be presumed to be their intention to be governed by the rules to which the form of the obligation is subjected.

The plaintiff sues for the recovery of a moiety of a note for five hundred dollars, which he had endorsed with James Dixon

in his lifetime, for Wm. Simons, to the Bank of Louisiana. Simons having failed to pay it, the Bank brought suit against the plaintiff, as the first endorser, and compelled him to pay the whole amount. He now claims of the defendants, as the heirs and legal representatives of Jas. Dixon, one moiety, as the amount he was bound for as co-endorser. The tenor of the original note is as follows:

"$500. Opelousas, 24th May, 1828."

"Twelve months after date, I promise to pay to Wm. G. Knox, or order, at the office of discount and deposite of the Bank of Louisiana at Opelousas, five hundred dollars; value received." "WM. SIMONS."

"Credit the drawer."

"W. G. K."

"J. D."

Endorsed on the back:

"Wm. G. Knox."

"Jas. Dixon"

The defendants denied their liability for any part of the note. That James Dixon endorsed it on the faith of the first endorser, and trusted to the solvency of the plaintiff as such, as his guarantee against the effects of his liability. That the plaintiff was payee and first endorser, and having paid, his recourse is against the drawer. That Dixon was not a surety of Simons on the note, but only the last endorser, and could not be held liable to any prior endorser.

It was proved by the cashier of the bank that the above note was discounted in bank as accommodation paper; and by Simons, that Knox endorsed the note first, but was told there would be another endorser. The endorsers put their names to the paper out of each other's presence, but both were on it when presented to the bank. There was judgement for the defendants.

Bowen, for the plaintiff.

Lewis, for defendants, distinguished this case from that of *Nolte et al.* vs. *their Creditors*, cited by the plaintiff's counsel.

WESTERN DIS *Sept.* 1832.

KNOX vs. DIXON'S HEIRS.

The question there was as to the amount of damages the endorser of an accommodation note could recover from the drawer, and the court very properly decided that he should recover no more than he had paid. Here the question is very different. It is, how are the endorsers of a promissory note, discounted in bank for the benefit of the drawer, liable with respect to each other? He made the following points in argument:

1. This contract is mercantile in its nature, and must be governed by the *lex mercatorio*.

2. In such cases the first endorser is liable to the second, the second to the third, and so on. 5 *Mar. N. S.* 196. 6 *Ibid.* 517.

3. In order to take negotiable paper out of the law merchant, a clear case must be made out of the intention of the parties to that effect; and the words "credit the drawer," subscribed with the initials of the endorsers at the foot of the note, is not alone sufficient to take the case out of the ordinary rules of law governing such contracts. 7 *Mar. N. S.* 368.

PORTER, J., delivered the opinion of the court.

This is an action by the payee and endorser of an accommodation note, discounted at bank, to compel the subsequent endorser to contribute his equal or virile share of the amount of the obligation. The note was protested, and taken up and paid by the plaintiff.

Parole evidence, taken on the trial below, shows the plaintiff endorsed the note in question first. The maker, on procuring his endorsement, told him he should have another endorser. The ancestor of defendants endorsed out of the presence of the plaintiff, and was not informed the maker had promised the payee to procure another endorser.

The note was in the usual form. On the face of it the following memorandum is found: "Credit the drawer. W. G. K., J. D." These are the initials of the names of the two endorsers.

The payee or first endorser on a bill or note is reponsible to all the endorsers or parties who come after him according to the *lex mercatoria*.

The case has been well argued, and the discussion at the bar has taken a wide range. It has been decided in this court in two cases, namely, that of *Bullard* vs. *Wilson* and *Stone* vs. *Vincent*, that the endorser of an accommodation note was responsible over to the endorsee, as he would be on any other paper. In the case of *Nolte & Co.* vs. *their Creditors*, where the rights of the payee against the maker of an instrument of this kind were examined; and in the case of *Dorsy & Co.* vs. *their Creditors*, where the subject was still more fully gone into, we expressly stated, "that as to all parties who came after the payee on the bill, the *lex mercatoria* applied in full force, and made him responsible under its rules." 5 *Martin, N. S.* 196. 6 *Ibid.* 518. 7 *Ibid.* 9, 498.

And although the court can look beyond the form in which the parties clothe their contract, yet without an express agreement to the contrary, it will be presumed to be their intention to be governed by the rules to which the form of the obligation is subjected.

There can be no doubt the court can look beyond the form into which the parties may have cast their contract. But what follows? Why, this: That unless an understanding is shown to take the case out of the obligations which the form given to the contract imposes, these obligations must be presumed to be within the intention of the parties, and that they engaged themselves accordingly. In the two cases last cited, which were in relation to accommodation paper, we were of opinion that the mercantile law did not, even where the contract assumed the form of a bill of exchange or a promissory note, enable the payee, or whoever may have lent his name to the maker or drawer, to recover from either more than he was compelled to pay. But as we intimated in these cases, as we had previously decided, and as we think now, the *lex mercatoria* imposes on the endorser of accommodation paper, the obligation to pay to every subsequent endorser or holder, in the same manner as in business paper. We refer again to the authority of Chancellor Kent and the authorities cited by him, both from English and American cases. "Accommodation paper (he says) is now governed by the same rules as other paper; this is the latest and best doctrine both of England and this country."

The *lex mercatoria* imposes on the endorser of accommodation paper the obligation to pay every subsequent endorser or holder, in the same manner as in business paper.

It cannot be made a question that endorsers to an accommodation note may take themselves out of this law, and by

WESTERN DIS. *Sept.* 1832.

BELL *vs.* BELL ET AL.

particular agreement make a law for themselves. But unless they do, we know of no law which can regulate their contracts, but that which governs negotiable paper in general. The principal question then, in this cause, is, whether the proof in this case shows the parties intended that their contract should be governed by other rules than those which the commercial law furnishes. The evidence offered to that effect is the memorandum on the face of the note, by which both endorsers direct the amount to be credited to the maker. This certainly furnishes some ground to infer that such might have been their intention. But after the best consideration we can give to the subject, we do not think it sufficiently strong to destroy the obligation created by one of the parties endorsing before the other.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the District Court be affirmed, with costs.

BELL *vs.* BELL ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

Where the error in the record is patent, and shown by the clerk's certificate, and after the cause has stood over one term, a *certiorari* will not be granted on the motion of the appellant, unless he accounts by affidavit or otherwise, for his apparent neglect to move for it sooner. The appeal will be dismissed at his costs.

The appeal, in this case, was taken to the August term, 1831, of this court, and continued over until August term, 1832. The suit is brought for the recovery of certain slaves. The plaintiff had judgement, and the defendant, who is in possession of the slaves, appealed.

Splane, of counsel for the defendant and appellant, suggested to the court, that the record was incomplete; several papers introduced in evidence, not appearing in it. He moved the court for a writ of *certiorari*, to bring up the missing documents and for a continuance to the next term. The clerk, in his certificate, specified the papers that were wanting to complete the record; this, the counsel contended, was sufficient to authorize the issuing of the writ, as the cause could not be tried on its merits, without it. See *Code of P.* 899.

Brownson, for plaintiff and appellee, was willing to admit the existence of the documents as they were offered in evidence, and proceed in the cause as though they were present; at all events, being his own evidence, he was ready to try the case without them.

The counsel on the other side declined going to trial, without the completion of the record.

Brownson moved to dismiss the appeal at the cost of the appellant.

PORTER, J., delivered the opinion of the court.

The clerk certifies the record in this case, to contain a correct transcript of the original proceedings, as far as they could be copied; and that two of the documents necessary to complete the statement of facts, had not been furnished to him.

The appellant has moved for a *certiorari* to amend the record. The action is a possessory one. There was judgement in the court below for the plaintiff; the case has stood upon the docket for twelve months; no proof is offered or even allegation made, that the defect in the record, was not known to the appellant long since. The 898*th article of the Code of Practice*, gives the right now invoked, when the error or omission is perceived on the argument or before; and the law contemplates that as soon as it is discovered, the party who requires the correction of the error, should have it made in a reasonable time, and that he should not unnecessarily delay the trial of the cause; the necessity of requiring this course

WESTERN DIS. Sept. 1832.

PREVOST ET AL. vs. SIMEON ET AL.

Where the error in the record is patent, and shown by the clerk's certificate, and after the cause has stood over one term, a *certiorari* will not be granted on the motion of the appellant, unless he accounts by affidavit or otherwise, for his apparent neglect to move for it sooner, the appeal will be dismissed at his cost.

is obvious, and particularly so, where the action is of the description now before us; and the appellant was the defendant in the inferior court. It is difficult to believe, because it is in the highest degree improbable, the appellant was not aware of the defect in the record long since; it was patent, and shown by the clerk's certificate to the transcript which he himself filed in this court. Under such circumstances, we think it behooved the party making the application for the *certiorari*, to account by affidavit or otherwise for this apparent neglect to move for it earlier; and that not having done so, he is not entitled to the writ. Parties must not be permitted to convert a remedy given them for the protection of their rights, into an engine to harass and delay their adversary.

The application is, therefore, refused, and the record as it now stands, not permitting us to examine into the correctness of the judgement rendered below, it is ordered, adjudged, and decreed, in conformity with the prayer of the appellee, that the appeal be dismissed with costs.

PREVOST ET AL. (F. P. C.) *vs.* SIMEON ET AL. (F. P. C.)

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. LANDRY.

Where the plaintiffs offer evidence of the credibility of one of their witnesses, the defendants may be permitted to question another witness sworn in the cause, if the witness, whose character is sought to be supported by testimony, has not been guilty of larceny?

In this instance the testimony on both sides is illegal, but as the plaintiffs resorted to that mode of supporting the credibility of their witness, they cannot complain that it is rebutted by the same means.

The declarations of the plaintiff cannot be given in evidence on his behalf, when it does not appear they made a part of the *res gesta*.

Where a case involves nothing but facts, and the testimony is various and contradictory, and where fraud and collusion are found by the court of the first instance, between the plaintiffs and defendants against the intervenors, although it is doubtful, from the evidence, whether the whole of the plaintiff's claim is fraudulent, yet the judgement of the inferior court will not be reversed.

The plaintiffs claim, as heirs of Joseph Prevost, deceased, two thousand six hundred and sixteen dollars and twenty-eight cents, which, they allege, came into the hands of George Simeon, as curator *ad bona*. J. Prevost, the ancestor of the plaintiffs, died in 1804, leaving considerable property in lands, slaves and stock. No steps were taken to administer his succsuccession until 1811, when an inventory was taken, and partition made of the horses and cattle, between his widow and six children, three of whom were majors. In 1818, George Simeon, one of the defendants, was appointed curator *ad bona* to the three minors. In 1821, the land was sold for one thousand five hundred dollars, to George Simeon, who shortly after paid the heirs and took a receipt. In 1817, the whole of the Prevost estate was the wreck of the stock and two negroes. G. Simeon gave bond and surety as curator in the penalty of four thousand dollars. Shortly after taking upon himself this curatorship, G. Simeon became embarrassed in his affairs, and executions issued against him at the suits of J. Miramond and M. Littell. The plaintiffs sued out their injunction, and prayed that the proceedings under the executions of Miramond and Littell be stayed; that they have judgement against Simeon as curator, and his surety, for the sum of two thousand six hundred and sixteen dollars and sixteen cents; the amount of property they allege came into his hands as curator, and a mortgage on all his property.

The interpleaders and defendants in the injunction pleaded the general issue, alleged fraud between the plaintiffs and defendants; the suit being intended to cover the property of

WESTERN DIS. *Sept.* 1832.

PREVOST ET AL. vs. SIMEON ET AL.

the defendants and protect it from seizure. The defendants made default.

Much testimony was taken to show the amount of property received by G. Simeon after he became curator, and as much introduced to show he received little or nothing. Some of the testimony was contradictory. The plaintiffs examined a witness to show one of their leading witnesses was worthy of all belief, to which the interpleaders asked a question, if this witness had not been guilty of larceny? The question was allowed to be asked, and the plaintiffs' counsel excepted; contending that the record of his conviction should be produced.

There was judgement dissolving the injunction, on the ground of fraud and collusion between the plaintiffs and defendants; that the plaintiffs claim was unsupported by evidence, &c. They appealed.

Simeon and *Brownson*, for plaintiffs.

Lewis and *Bowen*, for the defendants in injunction.

1. The plaintiffs cannot prove the declarations of one of the coplaintiffs in the suit, when it does not make a part of the transaction; it is admitting the party to make testimony for himself. 1 *Starkie*, 50, 69, 83, § 581. 90, § 64.

2. The defendants in injunction have a right to offer rebutting testimony of a witness, to show one of plaintiffs' witnesses had been guilty of larceny.

3. The counsel argued to show the plaintiffs' claim had no foundation in fact, but was fraudulent and collusive.

Where the plaintiffs offer evidence of the credibility of one of their witnesses, the defendants may be permitted to question another witness sworn in the cause, if

PORTER, J., delivered the opinion of the court.

This is an action against a curator by one of the persons to whom he was appointed; and by the representative of two others who are deceased. They claim the amount of the minors' inheritance from their father, which they allege came

into the possession of the defendant, and for which he has failed to account and pay over. They aver they have a mortgage on his estate, and they state that certain persons, viz. J. Miraumond and Moses Littell, have taken out execution against the property of the defendant, and will enforce it to the great injury of the petitioners, unless enjoined from so doing.

The defendant suffered judgement to go by default, and the case was contested in the Probate Court between the parties enjoined and the petitioners.

The answer, among other things, avers that the suit was fraudulent and collusive; that the plaintiffs have long since been paid, and that this action was instituted to cover the property of the defendant from the reach of the executions against which the injunction had been obtained.

The court below considered the charge of fraud and collusion sustained by the evidence, and gave judgement against the plaintiffs.

There are two bills of exceptions on record. One to the defendants being permitted to question a witness whether one of the witnesses sworn on behalf of the plaintiffs, had not been guilty of an act of larceny. It appears the plaintiffs had previously endeavored to prove the conduct of the witness in other transactions, to show how worthy of credit he was. The testimony on both sides was illegal, but as the plaintiffs resorted to that mode of supporting the credibility of their witness, they have no reason to complain it was rebutted by the same means.

The second is to a refusal of the court to receive the declarations of one of the plaintiffs in evidence. It does not appear they made part of the *res gesta*, and we think no error was committed in rejecting them.

The case on the merits was much contested in the court below, and the proof is contradictory. The claim of the plaintiffs to the extent set up in the petition is wholly unsupported by proof, and there is, we think, ample matter appearing on the record to justify the judge of the first instance in

the witness whose character is sought to be supported by testimony, has not been guilty of the crime of larceny.

In this instance the testimony on both sides is illegal, but as the plaintiffs resorted to that mode of supporting the credibility of their witness, they cannot complain that it is rebutted by the same means.

The declarations of the plaintiff cannot be given in evidence on his behalf, when it does not appear they made part of the *res gesta*.

Where a case involves nothing but facts, and the testimony is various and contradictory, and where fraud and collusion are found by the court of the first instance between the plaintiffs and defendants against the intervenors, although it is

WESTERN DIS. *Sept.* 1832.

PREVOST ET AL. *vs.* SIMEON ET AL.

doubtful from the evidence whether the whole of the plaintiffs' claim is fraudulent, yet the judgement of the inferior court will not be reversed.

pronouncing fraudulent and collusive a greater part of the demand. There is a small portion of it on which the evidence is not clear, and were it not for the decision below, we should doubt much if we could consider the whole claim as fraudulent. But cases of this kind depend so much on matters of which the judge who tried the cause has better means of being informed than we possess, that we do not feel authorized to reverse his decision.

It is, therefore, ordered, adjudged, and decreed, that the judgement of the Probate Court be affirmed, with costs.